U.S. Department of Labor

Office of Administrative Law Judges
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Date: February 1, 2000

Case No.: 1998-LHC-2063

OWCP No.: 07-133202

In the Matter of

RICHARD NALL

Claimant

v.

ABB VETCO GRAY, INC.

Employer

and

LANDMARK INSURANCE CO.

Carrier

APPEARANCES:

TIMOTHY S. MARCEL, ESQ.
For the Claimant

LAURIE BRIGGS-YOUNG, ESQ.
For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Richard Nall (Claimant) against ABB Vetco Gray,

Inc. (Employer) and Landmark Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on August 24, 1999, in New Orleans, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 25 exhibits while Employer/Carrier proffered 19 exhibits which were admitted into evidence along with one Joint Exhibit.[1] This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on December 7, 1999. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on November 2, 1993.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That Claimant reached maximum medical improvement with respect to the C6-7 level injury on April 11, 1994.

4. That Claimant reached maximum medical improvement with respect to the C4-5 and C5-6 level injuries on September 23, 1998.

5. That Employer/Carrier filed Notices of Controversion on

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[1] Employer/Carrier submitted on September 7, 1999 an additional exhibit relating to Claimant's earnings summary, which was received by the undersigned and marked as EX-19. Additionally, EX-19 contained a stipulation by the parties as to Claimant's average weekly wage, which is also received into evidence.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

June 3, 1994, June 8, 1994 and July 21, 1994.

6. That Claimant's average weekly wage at the time of injury was $751.89.

II. ISSUES

The unresolved issues presented by the parties are:

1. Fact of injury.

2. Causation of cervical injuries.

3. Causation of lumbar injuries.

4. Nature/extent of Claimant's injuries.

5. Suitable alternative employment.

6. Credit to Employer/Reimbursement to Employer's Long-Term Disability Carrier.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant, who was 45 years old at the time of the hearing and resides in Wiggins, Mississippi was last employed from about 1990-1993 by Employer as a service technician. (Tr. 63-65). His duties as a service technician involved installation of wellhead equipment on offshore and inland barges and land rigs. Id. Claimant has performed service technician work in the oil field for various employers since 1976. (Tr. 66). He claimed that in 1993, he was earning approximately $40,000 per year. Id. He explained he was paid a base salary, but was given $75.00 extra per day for working offshore and $25.00 extra per day for working inland. (Tr. 66-67). He was on 24-hour call and did not miss any work from November 1992 through November 1993. (Tr. 67).

On or around November 1, 1993, Claimant was assigned to a Chevron production platform in Venice, Louisiana to "unplug some wells." (Tr. 67-68). He arrived at the platform around 9:00 a.m. and was not experiencing any pains or aches at that time. (Tr. 71). Claimant explained that since the crane, which would have been used to pick up the plugging tool, was inoperable, he had to use the plugging tool, which weighed about 400 pounds, by manually

moving it from well to well. (Tr. 71-76). Claimant testified that after performing this activity on November 2, 1993, he began experiencing a burning sensation in his right shoulder. (Tr. 77). When he went to lunch, he did not tell anyone that his shoulder hurt. (Tr. 78).

After completion of the assignment, Claimant was still experiencing burning in his shoulder. Id. He testified that prior to leaving the rig, he did not report his shoulder pain to anyone. (Tr. 79). He also stated that once onshore, he reported to Employer, but did not relate a shoulder injury. Id.

Thereafter, at approximately 8:00 p.m., he returned to his apartment in Gretna, Louisiana, which he shared with his roommate, Philip Douglas, who also worked for Employer. (Tr. 80). He did not recall taking any medication for the pain, but rather, "just sat around the apartment." (Tr. 81-82). Between that night and the next day, Claimant began experiencing a throbbing pain in his right shoulder and down his arm. (Tr. 82). When his roommate, Mr. Douglas, returned to the apartment, Claimant asked him to "cover" for him on the next job assignment because he "hurt his arm offshore." (Tr. 83).

Claimant testified that he reported the arm and shoulder problems to Judy Dauterive, Employer's human resources administrator, but could not recall the date on which he reported it. (Tr. 84). He claimed Ms. Dauterive provided him with disability forms to complete. (Tr. 85). Claimant was asked whether the injury was work-related, to which he responded "[that he thought it was] bursitis or something" and "was going to get it took (sic) care of." Id.

Claimant was examined by Dr. Firestone on November 4, 1993 at which time he reported he had "bursitis." (Tr. 86). Dr. Firestone prescribed anti-inflammatories and restricted Claimant from work for a few days. Id. Claimant contacted Employer regarding the work restrictions. Id. He did not recall telling Ms. Dauterive that his shoulder had been bothering him since his last offshore assignment. (Tr. 87).

Claimant further did not recall being asked whether his injury was work-related. (Tr. 88). Nor did he tell Employer that his shoulder had been bothering him at work. Id. Claimant "hurt so bad" that he called Ken Sikes, his supervisor, to report that he was returning home to Mississippi for medical treatment. (Tr. 89).

After Claimant returned to Mississippi, he first treated at the Wiggins Clinic with Dr. Kyle, who prescribed anti-

inflammatories, which Claimant stated did not provide him any relief. (Tr. 90-91). Claimant returned a few days later, at which time he treated with either Dr. Campbell or Dr. Partrige. (Tr. 92). Dr. Campbell referred Claimant to an orthopaedist, Dr. Conn, in Hattiesburg, who in turn referred him to Dr. Cannella, a cervical specialist. (Tr. 92-93).

Claimant testified Dr. Cannella performed an MRI around November 23, 1993. (Tr. 93). He claimed he told Dr. Cannella that his pain began while working on the rig. (Tr. 94). Dr. Cannella diagnosed Claimant with a herniated disk and a bulging disk and recommended surgery for the herniation. (Tr. 95, 109). When Claimant first saw Dr. Cannella, he did not recall filling out a patient intake form. Id. Claimant subsequently underwent a fusion at the C6-7 level which provided him "a lot of relief." (Tr. 97). He claimed Dr. Cannella prohibited him from returning to his former employment as a service technician. (Tr. 98). Dr. Cannella further restricted Claimant from lifting objects weighing over 20 pounds, standing for long periods, lifting, pushing and pulling. Id. The last time Claimant saw Dr. Cannella, he was "feeling pretty good," but his neck "hurt all the time." (Tr. 98-99).

Claimant testified that he continued to stay in contact with Employer, particularly Ms. Dauterive, to report that he was still undergoing medical treatment. (Tr. 100). He claimed that around late November 1993, he asked Ms. Dauterive to file a claim under workers' compensation for his injury, but was told that he had "waited too late." Id. He further testified Ms. Dauterive told him he had only 14 days within which to file a workers' compensation claim. (Tr. 101). Claimant did not discuss the alleged work-related injury with his supervisors after speaking with Ms. Dauterive, nor did he ask anyone to complete a work accident claim form. (Tr. 102). He stated that at the time he spoke with Ms. Dauterive regarding filing a workers' compensation claim, he was already receiving income from a short-term disability plan. Id. Claimant is currently receiving long-term disability payments of approximately $1,493 per month. (Tr. 103).

After he was discharged by Dr. Cannella in April 1994, he did not seek any employment. (Tr. 104). It should be noted that in May 1994, Claimant filed a workers' compensation claim for his alleged injuries. He claimed he talked to various friends regarding work, but never filled out a job application. (Tr. 104-105). After he stopped treating with Dr. Cannella, Claimant continued to experience neck pain. (Tr. 105). He rarely engaged in household chores and when he did, his neck pain would intensify. (Tr. 105-106). Claimant testified he has problems traveling in an automobile because of bumpy roads and prolonged sitting. (Tr.

106).

Claimant did not seek any medical treatment between April 1994 and March 1997. (Tr. 107). He claimed that during this interim period, his neck pain became worse. Id. Eventually, he sought treatment from Dr. Danielson, to whom he reported numbness in his left arm and fingertips and extreme pain between his shoulder blades. (Tr. 108). He testified that he began experiencing left arm pain in 1996. (Tr. 109).

Claimant underwent an additional MRI at the request of Dr. Danielson, who recommended surgery after reviewing the films. (Tr. 110). He reported to Dr. Danielson that his pain began while working on the rig in 1993. (Tr. 110). Dr. Danielson subsequently scheduled Claimant for surgery and performed fusions at the C5-6 and C4-5 levels. (Tr. 111). While treating with Dr. Danielson, Claimant complained of lower back pain and leg numbness. (Tr. 112).

Between April 1994 and March 1997, Claimant testified he was not involved in any car accidents or fights, nor did he fall or suffer any trauma to his body. (Tr. 114). Claimant stated that after the second cervical surgery, he was placed in traction, which worsened his condition. (Tr. 114-115). Claimant recalled a laminectomy performed by Dr. Danielson in 1998, which provided some relief from his leg numbness. (Tr. 115-116). At the time of hearing, Claimant continued to treat with Dr. Danielson, who referred him to Dr. Hewes, a hip specialist. Id. Additionally, Claimant is treating with Dr. McKellar, a pain specialist. Id. Dr. Danielson also referred Claimant to a psychologist, but Carrier denied the treatment. (Tr. 117).

After the second cervical surgery, Dr. Danielson restricted Claimant from lifting more than 20 pounds, pushing, pulling and "jerking on things." Id. Claimant claimed the second surgery provided relief from numbness in his left arm. (Tr. 118). Claimant testified that currently, he experiences constant aches in his neck and back area. Id.

Claimant testified that he lives with his girlfriend, Kelly Moore, who takes care of the household chores. (Tr. 121). He claimed he cannot drive in a car more than one hour at a time without taking a break. (Tr. 122). He further testified that when he drives one-half hour to visit Dr. Danielson, he hurts "a whole lot worse...than [when he] left." (Tr. 124).

Claimant testified he served in the Navy until about 1972 or 1973. (Tr. 125). Thereafter, he began working offshore as a

roustabout, roughneck and derrick hand. (Tr. 126). Around 1976, Claimant began working as a 24-hour on-call service technician. (Tr. 127).

Claimant did not recall ever being shown a list of available jobs in his residential area. (Tr. 130). He stated that he is interested in returning to work, but has not applied for any jobs because he "[doesn't] know of any job that [he] could do." (Tr. 131). He testified that beyond the return-to-work physical restrictions placed upon him by his physicians, he would require the flexibility to lay down, if needed, or be able to go home for the day if he was in pain. (Tr. 133). Claimant also required an accommodation to be late to work on mornings after he took muscle relaxers. Id. He claimed that when he has pain episodes, he loses his concentration and gets headaches. Id.

Claimant testified that when Employer asked if the shoulder pain was work-related, he responded "no." (Tr. 134). However, he claimed he knew the pain was work-related, but he did not want to complete accident report forms because he "always felt like you was (sic) kind of looked down on for [filing an injury report]." (Tr. 134-135). Finally, he testified he eventually reported his pain as a work-related injury. (Tr. 135).

On cross-examination, Claimant testified that he understood Employer's policy to be that an employee should file an accident report as soon as the accident occurs. (Tr. 136). He also understood the policy of Chevron, which owned the platform, as requiring an accident report. He admitted that he did not follow either policy with respect to the alleged injury suffered on November 2, 1993. (Tr. 137). He explained that the reason he did not report an injury to Employer was because he thought is was "just bursitis," and did not think it was serious. (Tr. 137-138). Claimant testified that he thought he had bursitis upon returning inland, but admitted he does not have, nor has he ever suffered from, bursitis. (Tr. 138). He further testified no one has ever discouraged him from filing an accident report, nor has anyone ever told him he would "get into trouble" for filing one. (Tr. 139).

Claimant stated that he did not want to cost any other workers their "safety overalls" by filing an accident report. He explained that each rig is awarded safety bonuses for things such as no-lost-time accidents. Id. He admitted he would not have been penalized by Employer for filing an accident report. (Tr. 141).

On November 4, 1993, Claimant told Ms. Dauterive and John Fazende, the on-call dispatcher, that he was going to the doctor for his shoulder pain. (Tr. 142). He did not tell Mr. Fazende

that he had a work-related shoulder injury. (Tr. 143). Claimant did not recall completing a disability form when he met with Ms. Dauterive on November 4, 1993, although he admitted his signature was on the forms. (Tr. 144; EX-4). He also did not recall telling her that his injury was not work-related. (Tr. 146). Claimant did not tell Ms. Dauterive his injury happened offshore. (Tr. 147). He claimed he was in so much pain, he could not recall his earlier conversations with Ms. Dauterive. Id.

Claimant testified he visited Employer's physician, Dr. Firestone, to whom he reported that at 2:00 a.m. on November 4, 1993, Claimant experienced pain in his right shoulder. (Tr. 148). He claimed he told Dr. Firestone he had bursitis. (Tr. 150). Claimant explained he believed he had bursitis because "Judy [Dauterive] or somebody" told him that. Id.

Claimant did not know Dr. Firestone noted mild scoliosis and dorsal compression due to "old trauma or an old osteochondritis" (Tr. 152). He testified he had never been involved in a car accident or a fight in which he injured his back. (Tr. 152-153). Claimant did not recall returning to Employer's facility on November 4, 1993 to turn in a doctor's slip restricting him from work. (Tr. 153).

Claimant admitted that he did not report the injury as work-related to Dr. Kyle or Dr. Campbell. (Tr. 154). Furthermore, Claimant did not recall the medical history given to Dr. Partrige. (Tr. 154-155). He claimed that he later called Ms. Dauterive to discuss his injury as being work-related but was told by her that it was too late to file a workers' compensation claim. (Tr. 155). Claimant was unable to recall the exact date of this conversation with Ms. Dauterive. (Tr. 159).

Claimant saw Ms. Dauterive on November 19, 1993, when he turned in his truck to Employer. (Tr. 160). On that date, he recalled her giving him some paperwork to sign, but could not remember what forms he signed. (Tr. 160-161).

Claimant admitted that the medical history he reported to Dr. Cannella on November 23, 1993 was accurate: that he awoke on November 4, 1993 with right arm pain which began without a definite or precipitating cause. (Tr. 161). Claimant stated that he asked Dr. Cannella to change his injury from a private medical claim to a workers' compensation claim. (Tr. 162). He claimed Dr. Cannella told him that since he already filed it with private medical insurance to "just keep it that way." Id. Claimant testified that he changed his story and told Dr. Cannella his injury was work-related because he was afraid he might not be able to return to his

former employment. (Tr. 163-164).

Claimant did not recall discussing work restrictions with Dr. Cannella on April 11, 1994. (Tr. 170). Claimant understood he would be able to return to some kind of work. (Tr. 171). He did not recall completing a disability form on November 23, 1993 which was signed by Dr. Cannella on November 24, 1993. (Tr. 172). Claimant sought no further treatment from Dr. Cannella.

Claimant additionally testified that he was "hurting so bad" he began treating with Dr. Danielson in March 1997, three years after the last medical treatment had been rendered. (Tr. 174). He was referred to Dr. Danielson by the Wiggins Clinic. (Tr. 175). At the time of the hearing, Claimant did not have any future medical treatment set up with Dr. Danielson or Dr. Hewes, the orthopaedist to whom Dr. Danielson referred Claimant.

Claimant testified he first complained of lumbar pain to Dr. Danielson in December 1997. (Tr. 177-178). No physician has ever restricted Claimant from driving. (Tr. 178). Claimant possesses an expired driver's license, but continues to drive in Wiggins. (Tr. 179). He testified he cannot afford to purchase a new or used car. Id.

With respect to his monthly expenses, Claimant testified he does not pay rent. (Tr. 183). He estimated the following other monthly expenses: gas ($25-$30); cable ($75-$100); food ($400-$500); electric ($100); a "trumpet loan" ($60); a loan from a friend ($100); money to his son and girlfriend's son for extracurricular activities, clothes, spending money, etc. ($200). (Tr. 184). He also testified his girlfriend, Ms. Moore, receives approximately $200 per month in food stamps, which offsets his monthly food bill. (Tr. 185). It was concluded that Claimant incurs about $960.00 in monthly expenses. He further testified that when he needed to use a car to drive himself to the doctor, he borrowed his father's truck or friend's car. (Tr. 186).

Moreover, Claimant recalled meeting with Ms. Jennifer Palmer and Mr. Barney Hegwood, vocational rehabilitation counselors, who issued a report of Claimant's daily activities. (Tr. 190). Claimant denied awaking daily between 4:00 a.m. and 6:00 a.m. to help the children prepare for school. Id. He denied telling Ms. Palmer and Mr. Hegwood that it was his responsibility to ready the children for school. (Tr. 191). He admitted telling Ms. Palmer and Mr. Hegwood that he enjoyed reading novels. Id. He denied reporting to Ms. Palmer and Mr. Hegwood that he was "self sufficient" and was able to cook, clean, do laundry and other household chores. Id. He further denied the statement that he

relies on his friends to cut the grass and perform yard work. Id. Claimant explained the yard work is performed by his son, Ms. Moore's father or her brother. (Tr. 191-192).

Claimant additionally denied telling them that he took and passed his GED test. (Tr. 192). He claimed to not know whether he passed his GED. Id. However, Claimant listed that he had obtained a GED on his job application with Employer. (Tr. 193). He testified that he cannot show any documentation that he possesses his GED. Id.

After Dr. Cannella released him in April 1994 to return to modified work, Claimant did not inform Employer about the release. (Tr. 194). When he resumed medical treatment in 1997 with Dr. Danielson, Claimant failed to advise Employer that he was undergoing such treatment. (Tr. 195). Claimant testified he takes two Lodine per day for pain, as prescribed by Dr. Danielson. (Tr. 195-196). The last time Claimant presented to Wilson's Pharmacy with a prescription for 40 tablets of Lodine was on January 20, 1999.[3] (Tr. 196). He claimed he had eight tablets left at the time of the hearing. (Tr. 198). He last filled prescriptions for Ultram and Elavil in November 1998 and December 1998, respectively. (Tr. 197).

With respect to statements regarding his work duties as related to Ms. Palmer and Mr. Hegwood, Claimant stated that the following statements were accurate: (1) that he directed other employee's work if he was supervising rig hands and (2) that his duties included locating parts by number on a computer, performing paperwork, completing service tickets, reading pressure gauges and repairing and replacing valves. (Tr. 199-201). He disagreed that "he performed many sales duties." (Tr. 202). Claimant testified that if Ms. Palmer and Mr. Hegwood found a job within his physical restrictions, he would return to work. Id.

On re-direct examination, Claimant reaffirmed that he did not report his accident as work-related because he did not want to cause animosity between himself and his co-workers. (Tr. 215). He explained employees do not fill out accident reports unless one is "really hurt." (Tr. 216). After Dr. Cannella released Claimant to work, he did not return to Employer to seek re-employment. (Tr. 217).

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[3] At the rate Claimant testified he takes Lodine (two per day), by the time of hearing on August 24, 1999, he would have run out of medication. However, he later testified that he only takes Lodine when he is in pain. (Tr. 198). He also testified that he sometimes forgets to take the Lodine. Id.

Claimant additionally testified he does not have any sales experience, nor has he ever held a supervisory job title. (Tr. 219). He further stated that when he underwent his pre-employment physical exam, he was not told he had scoliosis. (Tr. 220).

In response to the undersigned's questioning, Claimant testified that the lumbar injury manifested itself four years after the work accident and is related to the November 2, 1993 injury. (Tr. 220). Claimant stated his leg numbness began in 1997. (Tr. 222).

Ken Sikes

Mr. Sikes, who has worked for Employer for 31 years, was employed as a service manager at the time of Claimant's alleged injury. (Tr. 222-223). He was responsible for supervising employees, namely, Claimant and Mr. Fazende, a dispatcher. (Tr. 224). Mr. Sikes explained that Claimant's position as a service technician required him to act as Employer's representative on various oil rigs. (Tr. 224-225). Mr. Sikes had no hesitancy in sending Claimant out as Employer's representative. (Tr. 225).

Mr. Sikes explained that the dispatcher makes notes in the log book of those employees who call in regarding incoming jobs or service equipment orders. (Tr. 226). He was present at his office on November 4, 1993, the date Claimant came in at 8:30 a.m. to speak with Mr. Fazende. (Tr. 227). Mr. Sikes overheard Claimant speaking with Mr. Fazende about a shoulder injury and asked him whether it was work-related, to which Claimant responded "no." (Tr. 228). He advised Claimant that if the injury was work-related, an accident form would need to be completed. Id. Claimant told Mr. Sikes that he wanted to take off a few days to return to Wiggins and that "if his shoulder didn't get better in three or four days, he'd go to the doctor." Id. In response, Mr. Sikes told Claimant that if he wanted to take off three or four days, he must obtain a doctor's excuse. Id. He did not recall if Claimant returned to Employer's facility that same day to turn in a work slip from Dr. Firestone. (Tr. 229).

Mr. Sikes explained Employer's policy is that an on-the-job injury must be reported immediately or as soon as possible. Id. He stated that any field service representatives should report work-related injuries to him or a dispatcher. Id. Mr. Sikes did not know Claimant claimed his injury was work-related until several months later when he received a notice from Employer's home office that a claim had been filed. (Tr. 230; EX-7).

Mr. Sikes testified it was his understanding that Chevron also

required employees to report on-the-job injuries immediately to a rig or platform supervisor. (Tr. 231-232). He additionally testified he had never been made aware by Chevron that Claimant suffered from an injury while working aboard the rig on November 2, 1993. (Tr. 232). Mr. Sikes stated he has never heard anyone discourage employees from reporting work accidents, nor has he ever advised an employee to not report an accident. Id. He testified there would be no reprimand or problem for an employee if he reported a work accident. Id. Moreover, Mr. Sikes stated there is no reason that he would not file an accident report if he had been informed of an on-the-job injury. Id.

He stated that he did not think Employer had light duty jobs available in the service department. (Tr. 233-234). After speaking with Claimant on November 4, 1993, Mr. Sikes did not recall speaking with him again regarding his shoulder injury. (Tr. 234). Claimant never told Mr. Sikes that the injury was work-related, nor has he ever contacted Mr. Sikes with respect to returning to work with Employer. Id.

On cross-examination, Mr. Sikes explained Employer's safety award program, which required attendance at safety meetings for "points." (Tr. 237). After a certain number of points was reached, employees would be presented with "a book that's got all kinds of stuff in it, safety awards, bags, clothes, hanging bags and knives or anything." Id. He testified the purpose of the program was to award employees for not getting hurt on the job. Id. Mr. Sikes disagreed there is an "unwritten code" among oil field workers that employees do not report lost-time accidents unless they are "really hurt." (Tr. 238).

On re-direct examination, Mr. Sikes stated if an employee did in fact report a work accident and injury, only that employee would be ineligible to receive safety awards. Id.

Philip Douglas

Mr. Douglas was deposed by the parties on August 11, 1999 in Boutte, Louisiana. He testified that he first met Claimant in 1992. (CX-24, p. 5). He further testified he shared an apartment with Claimant in Gretna, Louisiana in August or September 1993. (CX-24, p. 6). He ceased working for Employer in January 1994. (CX-24, p. 7).

While employed with Employer, he worked as a service technician, whose duties included overseeing the installation of rig equipment. Id. He testified he was on-call 24 hours a day and "could work anywhere from 30 minutes to two or three days,

depending on how long the job took." (CX-24, p. 8). Mr. Douglas explained other service technicians could "cover" a job for another co-worker. (CX-24, p. 9). He recalled covering for Claimant on a few occasions. Id.

Mr. Douglas first learned of Claimant's alleged injury when he noticed Claimant laying on the living room floor. (CX-24, p. 10). Claimant told him "he had hurt his shoulder on the job he had just come in from." Id. Mr. Douglas was unable to recall the exact date on which he observed this incident, but knew it occurred in November 1993. Id. He testified Claimant did not state how he hurt his shoulder, nor did Mr. Douglas ask. (CX-24, p. 11). Thereafter, Claimant asked Mr. Douglas to "cover" a job for him because he did not think he could work due to shoulder pain. Id.

Mr. Douglas did not recall if Claimant spent the night at the apartment any time thereafter. (CX-24, p. 13). Through a fellow employee whose name he was unable to recall, Mr. Douglas learned Claimant had ruptured a disc in his neck. Id. With respect to Employer's policy for reporting an on-the-job injury, he testified that an injured employee must report the accident as soon as possible to the on-call supervisor. (CX-24, p. 14). Mr. Douglas claimed that he had been previously injured on the job, for which he completed an accident report form, but did not lose any work time due to the injury. (CX-24, pp. 14-15). He did not recall whether he was asked to complete a short-term disability application. Id. Mr. Douglas additionally testified that there were times when he injured himself on the job, but did not report the injuries because "most companies [in the oil field business] look down on reporting an accident." Id. He explained that in determining when to file an accident report and injury claim, "it would depend on the seriousness of the accident." (CX-24, p. 20).

Mr. Douglas did not recall Claimant telling him which work activities caused his injury. (CX-24, p. 21). He stated Claimant told him only that "he hurt it offshore." (CX-24, p. 22).

On cross-examination, Mr. Douglas admitted that an accident was "serious enough" if it prevented an employee from returning to his regular shifts. (CX-24, p. 25). He did not recall any representative of Employer telling him to not file an accident report. (CX-24, p. 26). Mr. Douglas further stated that Claimant did not tell him that he had bursitis, nor has he ever known Claimant to have such a condition. (CX-24, pp. 26-27).

Mr. Douglas did not recall whether he found Claimant lying on the floor or whether Claimant came upstairs to speak with him on the day he was injured. (CX-24, p. 28). He also did not recall

telling Claimant that he probably had bursitis. (CX-24, p. 29).

On re-direct examination, Mr. Douglas explained further that "it's kind of an unwritten law that if it's not a serious accident, that you don't report it." (CX-24, p. 30). He admitted to injuring himself and thinking the pain would eventually go away and therefore did not report the accident. (CX-24, p. 31). He stated that in some instances the pain became progressively worse and prevented him from working, which was when he filed an accident report. Id. Mr. Douglas also testified that he did not think Claimant and his supervisor, Mr. Sikes, liked one another. (CX-24, pp. 31-32). Mr. Douglas testified Mr. Sikes, or another on-call supervisor, was responsible for providing an injured employee with an accident report and for reporting the accident to the main office. (CX-24, p. 34).

On re-cross examination, he stated that neither Mr. Sikes nor Mr. Fazende ever discouraged him from completing accident report forms. Id.

John Fazende

Mr. Fazende was deposed by the parties on December 20, 1994 in New Orleans, Louisiana. (EX-14). He has been employed with Employer as a service supervisor whose duties include "dispatching, rental equipment, general office duties, filing, morning reports." (EX-14, p. 8). He testified Claimant's duties as a service technician while employed with Employer consisted of supervising the installation of wellhead equipment. (EX-14, p. 10). Mr. Fazende was Claimant's supervisor in 1993. Id.

Mr. Fazende explained that he "manned" the service desk and logged all calls which came into the service department for equipment or service technicians. (EX-14, p. 12). He stated that if he was not looking after the service desk, a qualified technician was responsible for it. (EX-14, p. 13).

On November 4, 1993, Claimant came into the service area to report that he was going to see a physician at 1:30 p.m. because of shoulder pain; Mr. Fazende recorded such in the log book. (EX-14, p. 16). The log book noted on November 5, 1993 that Claimant called to report he was returning home to Mississippi. (EX-14, pp. 18-19). On November 7, 1993, Claimant reported he was going to the doctor on November 8, 1993 and would contact Employer after the appointment. (EX-14, p. 19). Mr. Fazende did not ask Claimant the nature of his problems at this time. (EX-14, p. 21). On November 8, 1993, Mr. Fazende noted in the logbook that Claimant, who had another doctor's appointment, was told he must obtain a physician's

release in order to return to work. Id. Claimant called again on November 10, 1993 to report he had another doctor's appointment. (EX-14, p. 23). Mr. Fazende testified that the information in the log book regarding Claimant was passed on to Mr. Sikes. (EX-14, p. 28).

Mr. Fazende did not recall when Claimant first alleged a work-related injury. (EX-14, p. 33). He testified it is his responsibility to complete accident reports for on-the-job injuries. Id. He did not complete an accident report form for Claimant's injury. (EX-14, p. 34). Mr. Fazende also did not recall when Claimant first began speaking about his shoulder pain. Id. Additionally, he explained that individual employees are given safety points for being accident-free. (EX-14, p. 35). Mr. Fazende described Claimant's work as "sometimes satisfactory." (EX-14, p. 37).

On re-direct examination, Mr. Fazende testified he never discussed with Claimant whether his injury was work-related or not. (EX-14, p. 39). Finally, Mr. Fazende stated that when he spoke with Claimant on the phone in November 1993, Claimant never mentioned the cause of his injury or where it occurred. Id.

Kelly Moore

Ms. Moore, Claimant's girlfriend who has resided with him for the last six years, was deposed by the parties on August 11, 1999 in Boutte, Louisiana. (CX-25). She testified her son from a previous marriage lives with them. (CX-25, p. 6). She also testified she received food stamps and Medicaid. (CX-25, p. 7).

Ms. Moore is not currently employed, but is looking for work. (CX-25, p. 8). She testified Claimant pays most of the bills, but that when she does bring in income, she "pitch[es] in on groceries and...clothes for kids...and stuff like that." (CX-25, p. 10).

She stated that she was present when Ms. Palmer and Mr. Hegwood met with Claimant at their home, but did not engage in conversation with them. Id. She disagreed with Ms. Palmer and Mr. Hegwood's statement that Claimant rises early to help the children get ready for school and claimed that in fact, she "get[s] up and get[s] the kids ready." (CX-25, p. 11). Ms. Moore stated Claimant reads western and Danielle Steele novels, but disagreed with Mr. Hegwood's statement that Claimant is "totally self-sufficient." Id. Ms. Moore further agreed that Claimant relies on friends to perform yard work and visits friends, plays games and drinks beer. (CX-25, p. 13). She stated that when she is working, Claimant is responsible for getting the kids ready for school. Id. She

testified that they used to enjoy camping, but Claimant can no longer engage in camping activities. (CX-25, p. 14).

Ms. Moore has accompanied Claimant a few times to his doctor's appointments. (CX-25, p. 16). She stated that he drives himself or friends drive him to his appointments. Id. She also stated that if she and Claimant drive together, she usually drives because "it's more comfortable on him." Id. Ms. Moore affirmed that Claimant smokes about a pack of cigarettes per day and occasionally drinks beer. (CX-25, p. 17).

On cross-examination, Ms. Moore testified that if Claimant does the laundry, he does not fold or pick up clothes. (CX-25, p. 19). She stated Claimant takes out the garbage from time to time. Id. Claimant engages in hunting once or twice a month during the winter. (CX-25, p. 20). She opined Claimant could perform all the household chores, but would be sore afterwards. (CX-25, p. 21).

Ms. Moore testified Claimant slipped in the tub and hit his back sometime in 1998. (CX-25, p. 22). Currently, Claimant complains to her of headaches, neck and hip pain. (CX-25, p. 23). She stated Claimant occasionally takes Elavil, but because the medication makes him groggy, "he don't (sic) take them unless he has to." (CX-25, p. 25). Claimant has smoked cigarettes since Ms. Moore has known him. (CX-25, p. 26).

On re-direct examination, Ms. Moore testified that Claimant's hip and back were bothering him before the 1998 fall in the tub. (CX-25, p. 28).

Judy Dauterive

Ms. Dauterive, who was employed by Employer from 1970 through 1998 as the human resources administrator, was deposed by the parties on August 9, 1999 in Destin, Florida. (EX-17). She explained that when an employee is injured, the accident should first be reported to their supervisor and that she was ultimately responsible for receiving and completing accident reports. (EX-17, pp. 4-5). Ms. Dauterive testified that Employer's policy required an employee who has been injured on the job to report the accident as soon as possible. (EX-17, p. 5). She also testified she was never told to not file accident reports for on-the-job injuries. (EX-17, p. 6). She also stated there were no bonuses or financial incentives that she would receive for not reporting work-related injuries. Id. She stated that if she were aware of a work-related injury, she would file a report on it. Id. Ms. Dauterive explained that Employer had the following benefits available to employees for non-work-related injuries: medical, dental, short-

term disability, long-term disability and a 401(k) plan. (EX-17, p. 7).

She met with Claimant on November 4, 1993, at which time he told her his arm was hurting. (EX-17, p. 9). At no time did Ms. Dauterive suggest to Claimant that he had bursitis. Id. She also testified she does not have bursitis and claimed she never told Claimant she had missed work due to bursitis. (EX-17, p. 10). In fact, she stated she had no knowledge as to what bursitis is or feels like. Id.

Ms. Dauterive testified that on November 4, 1993, she completed a disability form at Claimant's direction, but he signed the form. (EX-17, pp. 10-11). Claimant informed Ms. Dauterive that his injury would not be filed under workers' compensation because it was not work-related. (EX-17, pp. 11-12). During the meeting, Claimant did not relate to Ms. Dauterive his work activities which allegedly caused his injury. (EX-17, p. 12). Neither did he inform her that he felt shoulder and arm pain prior to November 4, 1993. Id. She testified Claimant's supervisors, Mr. Fazende and Mr. Sikes, did not report Claimant's accident to her as work-related. (EX-17, 13). Additionally, she never received an accident report form from Chevron, for whom Claimant was working. (EX-17, p. 14).

Ms. Dauterive testified that she met with Claimant a second time on November 18, 1993. Id. She denied telling Claimant that he could not file a work-related injury claim because 14 days had passed after the accident. (EX-17, p. 15). Ms. Dauterive explained that a workers' compensation claim can be filed 14 days after an accident occurs and has never told any employee, including Claimant, differently. (EX-17, p. 16). She also stated her job position would not be affected if she did or did not file Claimant's claim under workers' compensation. Id.

Ms. Dauterive testified that Claimant completed a disability claim form which was eventually faxed to Ms. Flora Francis, Employer's benefits coordinator. (EX-17, pp. 17-18). Although the disability claim form indicated Claimant's claim would not be filed under workers' compensation, Ms. Dauterive was later informed by Ms. Sharon Clarkson, Employer's human resources director in Houston, that Claimant was filing a claim under workers' compensation. (EX-17, p. 19). Ms. Dauterive subsequently completed the "first report of injury" form, which was dated May 24, 1994. Id.

On cross-examination, Ms. Dauterive testified she was laid off by Employer recently. (EX-17, p. 25). She explained that she did

not have authorization to complete accident forms or first report of injury forms unless a supervisor was aware of a work-related accident and completed an accident report first. (EX-17, 29).

She re-affirmed that Claimant did not attribute his injury to a work-related accident. (EX-17, p. 31). Nor did Claimant indicate to Ms. Dauterive that his shoulder began hurting while "on the job." Id. At the meeting with Claimant, she arranged for him to see a physician for his shoulder pain. Id. She explained that the proper procedure for filing a claim would be to inform the work supervisor first; however, Ms. Dauterive testified that Claimant went directly to her instead of Mr. Fazende or Mr. Sikes. (EX-17, p. 33). She stated it would have been improper procedure for her to complete a report of injury form without Claimant first advising his supervisor. Id.

She has never received any physicians' statements or certificates regarding Claimant's ability to return to work. (EX-17, p. 42). Rather, the only form Ms. Dauterive received was the disability claim form, which did not require independent medical statements from physicians regarding Claimant's ability to return to work. (EX-17, p. 43).

Ms. Dauterive re-affirmed that no one told her not to complete an accident report form regarding Claimant's injury. (EX-17, p. 51). Moreover, she explained she would not be involved in the accident reporting procedure unless the accident was reported to her by the injured employee's supervisor. Id. She also stated that before an injured employee (whether injured on the job or not) can return to work, he must complete a disability claim form or obtain a physician's note releasing him to work. (EX-17, p. 52).

She testified she never discussed Claimant's claim with Ms. Clarkson, Mr. Fazende, Mr. Sikes or any other Employer's representatives. (EX-17, p. 53). After completing the first report of injury, she sent the report to the Department of Labor and Employer's insurance carrier handled the claim thereafter. (EX-17, pp. 56-57).

On re-direct examination, Ms. Dauterive testified that if an employee came to her directly to file an accident report, she would direct the injured employee to inform his supervisor before completing first report of injury forms. (EX-17, p. 59). She re-affirmed that Claimant never stated he had a work-related accident. Id. Ms. Dauterive further stated that when she specifically asked Claimant if the injury was work-related, he told her "no." Id.

Medical Evidence

John E. Firestone, M.D.

Dr. Firestone, who is board-certified in internal medicine, issued a medical statement on August 5, 1999. (EX-3). He initially examined Claimant on November 4, 1993 as a "private patient" as Claimant "did not indicate that he was seeking treatment for a compensation injury." (EX-3, p. 1). At that time, Claimant reported "having trouble with his right shoulder." Id. Upon examination, Dr. Firestone opined Claimant had periscapular myositis. Id. Claimant was treated with an injection and was prescribed anti-inflammatories and pain relievers. (EX-3, pp. 1-2). He restricted Claimant from working until November 8, 1993. (EX-3, p. 2).

Keith Partrige (Wiggins Clinic Medical Records)

Dr. Partrige, board-certified in family practice, was deposed by the parties on August 12, 1999 in Wiggins, Mississippi. (CX-23). Claimant was first treated at the Wiggins Clinic on November 6, 1993 by Dr. J. Kyle.[4] (CX-23, p. 4; CX-3, p. 8). When Claimant returned to the clinic on November 8, 1993, he was examined by Dr. Campbell.[5] (CX-23, p. 4).

On November 10, 1993, Claimant presented at the clinic to Dr. Partrige with severe right shoulder and arm pain, which he began experiencing when he woke up November 5, 1993. (CX-23, pp. 5-6; CX-3, p. 5). There is no reference in Dr. Partrige's records that Claimant injured himself on the job. (CX-23, p. 6). Upon examination, Dr. Partrige found tenderness in the paraspinous muscles. (CX-3, p. 5). He administered an injection and prescribed pain relievers. Id.

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[4] Claimant presented to Dr. Kyle with complaints of shoulder and arm pain. (CX-3, p. 8). Dr. Kyle opined a "nerve impingement problem" since he found no evidence of soft tissue or bony inflammation. Id. Claimant was given an injection and prescribed a pain reliever. Id. It should be noted that Claimant did not report his injury as work-related to Dr. Kyle. Id.

[5] Dr. Campbell noted Claimant complained of bursitis. (CX-3, p. 6). Upon examination, he found soreness and tenderness in the shoulder area. Id. He administered an injection and prescribed a pain reliever. Id. Dr. Campbell was not told by Claimant that his injury was work-related. Id.

Dr. Partrige testified Claimant was seen by Dr. Campbell on November 15, 1993.[6] (CX-23, p. 6). Claimant did not return to the clinic until May 19, 1997 at which time he was examined by a nurse practitioner. Id. Additionally, Dr. Partrige treated Claimant on June 17, 1999 and August 3, 1999. Id.

On cross-examination, Dr. Partrige testified Claimant had been treated at the clinic prior to November 6, 1993 for unrelated conditions. (CX-23, p. 7). He also stated that when he examined Claimant on November 10, 1993, Claimant did not indicate he thought he had bursitis. Id.

Dr. Partrige explained the reason for the August 3, 1999 visit was for treatment of arm sores. (CX-23, p. 9). At that time, Claimant also requested a referral to a pain treatment specialist, Dr. McKellar, at the Wesley Hospital in Hattiesburg. Id.

On re-direct examination, he explained it is not unusual for a patient to be slightly inaccurate by "a day or so" in stating when the pain first occurred. (CX-23, p. 11). Dr. Partrige stated there were no back pain complaints during the 1993 clinic visits. His first records of Claimant's lower back pain are noted on June 17, 1999. (CX-23, p. 12).

Dominic M. Cannella, M.D.

Dr. Cannella, board-certified in neurosurgery, was deposed by the parties on April 22, 1999, in Tupelo, Mississippi. (CX-21). He first examined Claimant on November 23, 1993 based on a referral from Dr. Conn, an orthopaedist. (CX-21, p. 5; attached exhibit B, p. 1). Dr. Cannella was told by Claimant that on November 4, 1993, he "awoke with right arm pain, which began without a definite known precipitating cause and which had gotten progressively worse." Id. He did not recall whether Claimant was still actively working at the time he began treatment. (CX-21, p. 6).

Upon physical examination, Dr. Cannella did not find any evidence of pressure on Claimant's spinal cord (myelopathy), but did find some radiculopathy. (CX-21, pp. 6-7). Dr. Cannella opined that C7 radiculopathy was probably secondary to a herniated cervical disc at the C6-7 level. (CX-21, p. 7; attached exhibit B, p. 2).

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[6] Dr. Campbell noted Claimant continued to experience shoulder pain. (CX-3, p. 3). At this time, he referred Claimant to Dr. Weaver. Id.

Claimant was re-evaluated on December 2, 1993, at which time, he underwent an MRI, which confirmed Dr. Cannella's initial impression of a large ruptured disc at the C6-7 level "with compression of the seventh nerve root." (CX-21, p. 8; attached exhibit B, p. 4). Furthermore, Dr. Cannella found an insignificant mild bulging disc at the C5-6 level, which he opined did not warrant surgery. Id.

Dr. Cannella testified Claimant underwent a C6-7 anterior cervical diskectomy with fusion on December 3, 1993 at Methodist Hospital of Hattiesburg. (CX-21, p. 11; attached exhibit B, pp. 7-12). Upon examination, he did not find reason to proceed with surgical intervention on the C5-6 level. Id. Dr. Cannella opined that Claimant's disc herniation and pain complaints were due to degeneration. (CX-21, p. 12).

Claimant returned on January 17, 1994, at which time he reported his arm pain had diminished. (CX-21, p. 13). Dr. Cannella examined Claimant again on February 28, 1994, at which time x-rays were taken to check the progress of the fusion. (CX-21, p. 15). The x-rays revealed "good progression of fusion at the C6-7 interspace." (CX-21, p. 15; attached exhibit B, p. 14). At that time, Claimant reported his right arm pain was "nearly totally resolved." Id.

Dr. Cannella testified that after the surgery, he recommended Claimant not return to strenuous physical labor or activity, including heavy lifting greater than 20 pounds and prolonged activities, such as sitting, standing, stooping, bending, pushing or pulling. (CX-21, p. 16; attached exhibit B, p. 15). These restrictions were advised on April 11, 1994, which was the last time Dr. Cannella treated Claimant. (CX-1, pp. 3-4). At that time, Dr. Cannella discharged Claimant and opined that Claimant could work full-time within the stated restrictions. Id. Thereafter, Claimant did not return for any medical treatment by Dr. Cannella.

Dr. Cannella testified that on the Physician's Statement of Functional Capacity, which was completed on June 23, 1994, he stated that Claimant's condition was not work-related in light of the history relayed to him by Claimant. (CX-21, p. 22; attached exhibit B, pp. 19-20). Additionally, he noted on the Disability Evaluation that Claimant was disabled from returning to his former employment, but could return to some occupation. (CX-21, p. 22; attached exhibit B, pp. 17-18). Dr. Cannella considered Claimant a candidate for vocational rehabilitation. (CX-21, p. 23).

Dr. Cannella did not recall Claimant telling him that he was

injured on the job. (CX-21, p. 25). Rather, he explained that since he is "used to dealing with Workmen's Compensation injuries in the field of neurosurgery...we specifically ask people, why are you hurting? And if they say, I hurt myself at work, we document that in the statement." Id. He testified that some of his patients have requested him to file their injury under Workmen's Compensation, even though the patient was not injured on the job, but that Dr. Cannella has "steadfastly refused to arbitrarily assign a patient to Workmen's Compensation." (CX-21, p. 26).

Dr. Cannella additionally opined that Claimant's present complaints of lumbar pain are consistent with degenerative problems because Claimant has "a consistent history of degenerative problems leading to other neck and low back trouble." (CX-21, pp. 26-27).

On cross-examination, Dr. Cannella testified Claimant could return to an occupation where he was capable of sitting and standing at will. (CX-21, p. 28). Furthermore, he explained Claimant could lift 0-15 pounds for approximately one-third of an eight-hour-work day. Id.

Dr. Cannella has not reviewed any medical records from other physicians who treated Claimant. (CX-21, p. 32). He admitted that if Claimant was injured in the manner alleged, the accident could be a precipitating cause for a degenerative disc to be symptomatic. (CX-21, pp. 33-34). He also stated that shoulder pain is common when a cervical disc "blows out." (CX-21, p. 34). Furthermore, Dr. Cannella stated that neck pain can be associated with shoulder pain. Id.

Additionally, Dr. Cannella hypothesized that Dr. Danielson's diagnosis of disc herniation and extrusion with minor spondylosis is possibly a consequence of the fusion combining with Claimant's degenerative condition. (CX-21, p. 36). He explained that because Claimant did not relate a specific incident which precipitated his pain, Dr. Cannella assumed his problem was due to a degenerative problem. (CX-21, p. 40). However, he stated that if Claimant had related to him that his pain began after a specific incident, he would have "considered his ruptured disc the result of an injury." Id. He recommended a vocational rehabilitation program for Claimant because Claimant told him he "was not trained or educated to perform any other type of occupation." (CX-21, p. 43).

On re-direct examination, Dr. Cannella testified that scoliosis of the spine would not have an effect on Claimant's condition. (CX-21, p. 44). He stated, however, that significant prior spinal trauma may predispose a person for development of degenerative change in the future. (CX-21, p. 45). He opined that

Claimant's later cervical problems were due to degeneration. Id.

Harry A. Danielson, M.D.

Dr. Danielson, board-certified by the American Academy of Neurological and Orthopaedic surgery, as well as Microneurosurgery, was deposed by the parties on June 28, 1999.[7] (CX-22). Based on the referral of Mr. Bill Moore, Dr. Danielson first examined Claimant on April 17, 1997 for complaints of neck pain, shoulder pain, left arm pain and finger and arm numbness. (CX-22, p. 11; CX-2, p. 11). At that time, Claimant told Dr. Danielson he had been injured while working on an oil rig in November 1993 and related his previous medical treatment. (CX-22, pp. 12-13; CX-2, p. 11). Dr. Danielson opined Claimant had a central disc protrusion at the C4-5 level. (CX-2, p. 12). Additionally, he diagnosed stenosis at the C5-6 level and "a herniated disc with cord compression." Id. He suggested Claimant undergo cervical and lumbar myelograms to assess his condition. (CX-22, p. 14). Dr. Danielson testified Claimant complained of minor back problems which were not recorded in the medical record. Id. At that time, he opined Claimant could not perform any work. Id.

The myelogram was performed on February 26, 1998, which indicated flattening of the spinal cord at the C5-6 level, as well as disc problems at the C4-5 level. (CX-22, p. 15). Additionally, a herniated disc at the L4-5 level was noted. Id. Dr. Danielson suggested a fusion and disc removal procedure "in an attempt to get [Claimant] back into some kind of productivity." Id. A CT scan was also performed, which revealed stenosis at the C5-6 level and C-6 nerve root edema. (CX-22, p. 16). Dr. Danielson noted that Claimant had pre-existing degenerative change at each level. Id.

On April 3, 1998, Claimant underwent surgery at the C4-5 and C5-6 levels. (CX-22, pp. 17-20). Dr. Danielson re-evaluated him on April 22, 1998, at which time, he noted Claimant was "doing well." (CX-22, p. 20; CX-2, p. 9). Claimant returned on July 23, 1998 complaining of low back pain, although the x-rays showed " a nice cervical lordotic curve" and Dr. Danielson noted his condition was healing. (CX-22, p. 21; CX-2, p. 9). Dr. Danielson saw Claimant again on September 1, 1998, at which time he discussed the herniated disc at the L4-5 level with Claimant. (CX-22, p. 22; CX-2, p. 7). Surgery on the herniated lumbar disc was performed on September 23, 1998. (CX-22, p. 23).

Claimant was re-examined by Dr. Danielson on October 6, 1998,

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[7] Dr. Danielson is not board-certified in neurosurgery.

at which time, it was noted that he was experiencing muscle spasm and nerve swelling. (CX-2, p. 6). Dr. Danielson noted Claimant remained temporarily and totally disabled at this time. Id.

Claimant returned to Dr. Danielson on November 10, 1998, at which time, an MRI was performed to determine if Claimant had a "recurrent disc" since he was complaining of leg pain. (CX-22, p. 23; CX-2, p. 5). Claimant did not have any arm or shoulder pain. (CX-22, p. 24; CX-2, p. 5). He continued to treat with Dr. Danielson with no significant change in his condition noted in the January 5, 1999 medical records. (CX-2, p. 4). Claimant was still considered temporarily and totally disabled. Id.

Dr. Danielson last examined Claimant on May 20, 1999, at which time, he referred him to Dr. Thomas Hughes, an orthopaedist, for left hip pain complaints. (CX-22, p. 24). He testified that Claimant remained temporarily and totally disabled, but was close to reaching maximum medical improvement. (CX-22, p. 25). He opined that by July 1999, Claimant should have reached maximum medical improvement with respect to his back condition. (CX-22, p. 27). Dr. Danielson opined Claimant had a 15% impairment rating as a result of the C4-5 and C5-6 levels, as well as a 10% impairment rating as a result of the L4-5 level. (CX-22, pp. 27-28).

Dr. Danielson explained that Claimant's initial shoulder pain experienced (C6-7 level) after the accident could have been due to the blown disc in his neck. (CX-22, p. 28). He further testified that Claimant's work activities could have caused the herniated disc to become symptomatic and/or blow out. (CX-22, pp. 30-31).

With respect to Claimant's cervical condition, Dr. Danielson would restrict him from rapid head and neck movements, prolonged extension of the neck and stacking objects overhead. (CX-22, pp. 34-35). With respect to Claimant's lower back condition, Dr. Danielson would limit him to lifting no more than 20 pounds and would require frequent changes in positions as Claimant's tolerance demanded. (CX-22, p. 35). Additionally, Dr. Danielson restricted him from frequent bending, stooping and squatting. Id. He stated vocational rehabilitation is a possible avenue for Claimant to pursue. (CX-22, p. 37).

Dr. Danielson did not expect Claimant to require much future medical treatment, other than "medication from time to time." (CX-22, p. 38). He opined that in the absence of any other history than that provided, the C4-5, C5-6 and L4-5 level injuries were "probably" the natural progression of the 1993 accident. (CX-22, p. 39). He further explained that because Claimant was a smoker, it affected his ability to heal quickly and properly. (CX-22, pp.

41-42).

On cross-examination, Dr. Danielson testified he has never reviewed any prior medical treatment Claimant underwent because he was not provided with such records. (CX-22, p. 45). He was told by Claimant he was injured on November 4, 1993. (CX-22, pp. 46-47). Dr. Danielson testified Claimant related his pain to a specific precipitating cause, namely the November 1993 accident. (CX-22, pp. 52-53).

Dr. Danielson further explained that a herniated disc can be an "ongoing process" with no specific trauma triggering the pain. (CX-22, p. 56). He admitted that it would be consistent with degenerative disc disease for Claimant's condition at the C5-6 level to progress from November 1993 to April 1997 to a "clinical" condition. (CX-22, p. 57). Dr. Danielson did not agree with Dr. Cannella's diagnosis of a ruptured degenerative disc because "he didn't have the history" Dr. Danielson received. (CX-22, pp. 58-59). Dr. Danielson disagreed with Dr. Cannella's observation of "being able to visualize the C5-6 area during surgery." (CX-22, pp. 65-66). Rather, he explained that level cannot be seen "on the back side where it's herniated" because that "disc space [was not] opened." (CX-22, p. 66).

Dr. Danielson opined Claimant's C4-5 and C5-6 level problems are not the sole result of the C6-7 fusion site. (CX-22, p. 79). Furthermore, he opined that the problems were most likely due to an anulus tear, degeneration of which was precipitated by an injury or "some accumulated injuries." (CX-22, pp. 79-80). He explained that a person can go for years with a torn anulus before a herniation actually occurs. (CX-22, p. 80).

Assuming Dr. Cannella assigned a 9% impairment rating to Claimant's condition, Dr. Danielson assigned an additional 9%, for a total impairment rating of 18%. (CX-22, p. 82). He opined that Claimant reached maximum medical improvement from a cervical standpoint on September 23, 1998. Id. He opined that if Claimant's lumbar problems were not due to the November 1993 accident, they are "due to some tear in the anulus that [Claimant] developed from lifting or torquing some way." (CX-22, p. 83). Dr. Danielson would not relate the lower back pain to the 1993 accident because of the length of time which passed before the condition manifested itself. (CX-22, pp. 84-85). He opined that as of July 30, 1999, Claimant reached maximum medical improvement with respect to his back condition. (CX-22, p. 85).

He testified that he does not have any reservations regarding Claimant undergoing a functional capacity evaulation. (CX-22, p.

87). Dr. Danielson has no record of Claimant relating a July 28, 1998 fall which allegedly aggravated his back pain. Id.

On re-direct examination, Dr. Danielson testified Claimant does not have any permanent neurological deficits. (CX-22, p. 90). He admitted that by "tugging on a chain," Claimant could have precipitated the disc herniation. Id. He also stated that "sleeping" is not consistent with tearing an anulus. Id.

Robert Hewes, M.D.

Claimant was referred to Dr. Hewes[8] by Dr. Danielson for his left hip pain. (CX-8, p. 1). Upon initial examination on June 22, 1999, Claimant complained of pain "over the lateral side of the ilium superior." Id. However, Dr. Hewes noted that Claimant had no point of tenderness to palpation in that spot. Id. He opined Claimant did not have a hip joint problem, but recommended a bone scan "to rule out any lesion in the ilium." Id. Claimant returned on July 9, 1999, at which time, the bone scan revealed "increased uptake in the left side of the ribs at the 10th and 3rd ribs." Id. Claimant denied suffering any trauma. Id. At this time, Dr. Hewes recommended a mechanical evaluation to be performed by a physical therapist. Id.

Vocational Evidence

Barney Hegwood

Mr. Hegwood, a state-licensed vocational rehabilitation specialist and nationally certified rehabilitation counselor, was asked to assess Claimant's vocational ability at the behest of Employer/Carrier's counsel. (Tr. 242-243). He testified Claimant's file was initially opened in late 1995 or early 1996, but due to difficulty in scheduling appointments, the file was closed. (Tr. 243). It was re-opened on December 16, 1998. Mr. Hegwood and Ms. Palmer met with Claimant in Wiggins, Mississippi on February 9, 1999. Id. Mr. Hegwood issued an initial evaluation of Claimant on May 3, 1999 and an addendum report on August 4, 1999. (Tr. 243-244; EX-13).

Mr. Hegwood testified that he recorded information regarding Claimant's daily activities as told to him by Claimant. (Tr. 248-249). In writing his report, Mr. Hegwood explained that it is important he receive accurate information because that it used in

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[8] The record is devoid of Dr. Hewes' medical speciality and qualifications.

writing his report. Id. Mr. Hegwood testified that Claimant reported he could not drive more than one hour without getting out to move around. (Tr. 250).

Several tests were performed by Mr. Hegwood, including the Woodcock Johnson Achievement Test,[9] Slosson IQ test and a career assessment inventory. (Tr. 252-253; EX-13, pp. 18-20). Claimant exhibited no physical problems sitting while taking the 45-minute Woodcock Johnson Achievement test. (Tr. 252).

A labor market survey was performed August 4, 1999, in which Mr. Hegwood identified the following positions which Claimant was physically and functionally capable of performing: industrial sales position (Superior Lamp & Supply); manager trainee (Blue Ribbon); route sales position (Schwan's Ice Cream); auto sales position (Bert Allen Pontiac/GMC); counter sales manager (Ferguson Enterprises, Inc.); security officer (Imperial Palace of Mississippi); and night manager (Motel 6). (Tr. 258-260; EX-13, pp. 24-26). Mr. Hegwood testified that in finding suitable jobs, he considered Dr. Danielson's physical limitations placed on Claimant as set forth in his June 28, 1999 deposition. (Tr. 260).

Additionally, he claimed that when he spoke with each potential employer, he specifically discussed whether the job duties fell within Claimant's capabilities. (Tr. 261). Mr. Hegwood also asked potential employers whether Claimant would be considered for the job position. (Tr. 262). The majority of the positions identified were located in Gulfport, Mississippi, which is approximately 38 miles from Wiggins, Mississippi, Claimant's home town. Id. Mr. Hegwood testified that considering Claimant's educational background, his current disability and his age, Claimant could readily compete for the jobs identified in the August 4, 1999 report. Id.

Mr. Hegwood explained Claimant's file was originally opened on February 2, 1996 in order to identify job positions he was capable of performing since he had reached maximum medical improvement with respect to his neck condition. (Tr. 263). The file was subsequently closed on January 3, 1997. (Tr. 265). However, the file was re-opened on December 16, 1998 to perform a retroactive labor market survey in order to demonstrate jobs were available, if Claimant had been interested in pursuing such jobs. (Tr. 265-266). With respect to the retroactive labor market survey of May 3, 1999, Mr. Hegwood testified the jobs identified were considered light-

[9] The Woodcock Johnson Achievement test measures aptitude in letter/word identification, comprehension, math calculation and applied problems (verbal math problems).

duty and were available. (Tr. 266-267). The retroactive labor market survey performed on May 3, 1999 identified various general job positions which Mr. Hegwood claimed were available from 1994 through 1998.

1994:	manager trainee (3 positions) sales representative (4 positions) warehouse manager (1 position) dispatcher (1 position)
1995:	manager/manager trainee (6 positions) sales representative (2 positions) auto salesperson (2 positions) dispatcher (2 positions)
1996:	sales representative (8 positions) manager/manager trainee (4 positions)
1997:	sales representative (7 positions) manager/manager trainee (5 positions) dispatcher (1 position)
1998:	sales representative (4 positions) manager/manager trainee (2 positions)

See EX-13, pp. 13-18.

Mr. Hegwood explained that when conducting a labor market survey in a small town, such as Wiggins, it is common to look for positions outside the city limits, particularly in a larger, more metropolitan city, such as Gulfport. (Tr. 267). He further testified that he tries to remain within a 50-mile radius of where an individual lives in conducting his labor market surveys. (Tr. 268).

Furthermore, he stated that he did not focus on "menial jobs," such as "pizza delivery folks and the door-greeters at Wal-Mart and the gate guards," because "those kinds of jobs are always [available]." (Tr. 271). Mr. Hegwood testified those types of positions are usually minimum wage and because he felt Claimant was a "pretty good wage earner," he did not consider such jobs. Id. He testified that he looked for positions in Wiggins and found a counter clerk position at Gateway Lumber Company, which paid $6.00 per hour and a sales inventory clerk position at Bill's Dollar Store, which paid $5.15 per hour. (Tr. 272). Mr. Hegwood opined that Claimant was overqualified for both of these positions, but stated that they fall within his physical abilities. Id. Mr. Hegwood also testified that there had been a general job

availability for sedentary and light-duty jobs in Southern Mississippi since April 1994. (Tr. 274).

On cross-examination, Mr. Hegwood testified that he did not have any documentation showing the availability or the wage rate of the positions located in Wiggins. (Tr. 275). He further stated that each job was a full-time position, requiring 40 hours per week. (Tr. 277). He located these positions after obtaining the telephone numbers and addresses of various businesses in Wiggins via the Internet. (Tr. 277-278). Mr. Hegwood explained that he had previously conducted a Yellow Pages survey and a newspaper survey for positions available in the Wiggins area, but the information contained therein was not useful. (Tr. 278). He stated he was not submitting the two jobs identified in Wiggins (counter clerk and sales inventory clerk) as suitable alternative employment due to the wage rate paid. (Tr. 279).

Mr. Hegwood did not discuss what percentage of each day Claimant would spend bending, lifting, sitting and standing, but rather, asked generally if Claimant could alternate sitting, standing, walking or any other activity whenever he so requires. (Tr. 281). He claimed each potential employer included in the labor market survey responded "yes." Id.

He opined that whether Claimant was capable of the seven positions identified in Gulfport depended upon, among other things, his ability to tolerate driving almost 40 miles (one-way) to and from work. (Tr. 282). Mr. Hegwood explained that three of the positions involved driving in order to perform the job duties, i.e. the route sales position. Id. He also stated that several positions involved commission wages, i.e. the auto sales position, but was not able to state with specificity Claimant's actual earning potential. (Tr. 283-284). He testified that if Dr. Danielson still considered Claimant temporarily and totally disabled, Claimant would be unable to return to work. (Tr. 289).

Mr. Hegwood testified Claimant scored "81" on the Slosson IQ test, which was determined to be below average. (Tr. 289-290). He explained the purpose of the test scores was to demonstrate that positions within the semiskilled and skilled range existed for Claimant. (Tr. 291). He did not inquire of the minimum educational requirements for each position because he did not think such requirements would have any bearing on whether Claimant would be hired. (Tr. 292).

Mr. Hegwood testified Claimant's letter/word identification and comprehension were at the high school level, but his math skills were at the junior high or middle school level. (Tr. 293).

He further opined Claimant needed to improve his social skills, particularly as they relate to the job interview process. (Tr. 297).

Mr. Hegwood admitted he did not specifically identify employers in his retroactive labor market survey, but rather, performed the survey to identify categories of employment. (Tr. 298). He testified he did not contact any potential employers, nor did he submit to Claimant the job listing descriptions found. Id. He stated that he directed all labor market survey information to Employer/Carrier and Claimant's counsel. Id.

In response to the undersigned's questioning, Mr. Hegwood testified that the physical restrictions placed on Claimant by Dr. Cannella allowed him to work within the sedentary physical-demand range. (Tr. 300-301). Mr. Hegwood further admitted that the retroactive labor market survey fails to set forth with specificity the physical demands and requirements of any jobs identified. (Tr. 301). He concluded Claimant was physically able to perform the jobs identified "based on [Mr. Hegwood's] experience in placing individuals with handicaps similar to [Claimant's]." (Tr. 303). With respect to the jobs identified in the August 4, 1999 labor market survey, Mr. Hegwood considered the jobs sedentary to light duty. Id.

Jennifer Palmer

Ms. Palmer, a licensed vocational rehabilitation specialist and a nationally board-certified mental health counselor, testified that she co-authored Mr. Hegwood's May 3, 1999 retroactive labor market report. (Tr. 308). She testified that she met with Claimant in February 1999. (Tr. 309). At that time, she did not record that Claimant had any problems with driving. (Tr. 310). She further reported that Claimant told her he took the GED test, but never knew the actual results. Id.

During the interview with Claimant, Ms. Palmer recorded that Claimant "arises between 4:00 and 7:00 a.m." to help the boys get ready for school. (Tr. 311; EX-13, p. 6). She stated that during the interview, Claimant's girlfriend, Ms. Moore, was sleeping and "didn't get up till quite a bit later." (Tr. 311-312; EX-13, p. 6). Claimant reported taking various medications, including Ultram, Valium, Hydrocodone and Lortab. (Tr. 312-313; EX-13, p. 10).

Ms. Palmer explained that what Dr. Cannella classified as sedentary work "would actually be light-duty work, according the Department of Labor's definition." (Tr. 314). She also stated

that Dr. Danielson's restrictions would allow Claimant to perform sedentary to light-duty work. (Tr. 317). Ms. Palmer explained that the only difference between Dr. Danielson and Dr. Cannella's cervical spine restrictions is that Dr. Danielson believes Claimant should avoid rapid neck movements or quickly turning his head. (Tr. 318).

She further testified that she agreed with the opinions set forth in the May 3, 1999 report. Id. Ms. Palmer opined that there was a general light-duty and sedentary job availability in the southern Mississippi area from April 1994 through the present. (Tr. 319).

On cross-examination, Ms. Palmer testified that Dr. Cannella's 20-pound lifting restrictions falls within the light-duty category. (Tr. 324). She considered Claimant to be self-sufficient and independent. (Tr. 327). Ms. Palmer testified Claimant reported he does some cooking, washing dishes and laundry. Id. She found Claimant had some difficulty recalling certain things. (Tr. 328).

Tom Stewart

Mr. Stewart, a licensed vocational rehabilitation and nationally certified rehabilitation counselor, was retained by Claimant's counsel to assess Claimant's employability and rebut Ms. Palmer and Mr. Hegwood's labor market surveys of May 3, 1999 and August 4, 1999. (Tr. 330-331; CX-18). He did not find the retroactive labor market survey of May 3, 1999 very reliable because it was not specific enough with respect to physical demands. (Tr. 331; CX-18, p. 7). Mr. Stewart testified that the August 4, 1999 report would have to be considered invalid and hypothetical because Dr. Danielson opined Claimant was temporarily and totally disabled. (Tr. 332; CX-18, p. 7).

With respect to the various sales positions identified in the August 4, 1999 report, Mr. Stewart testified that those positions would not be suitable alternative employment because Claimant "never actively solicited sales in a true sales capacity" and therefore does not possess sales experience. (Tr. 333; CX-18, p. 7). He further stated Claimant has never gained any specific transferable skills referable to the positions identified in the most recent survey. Id.

Moreover, Mr. Stewart opined Claimant would not be seriously considered for the job positions due to his below-average IQ score, low math scores and lack of high school diploma. (Tr. 334-335). He testified that there is a direct correlation between the distance one commutes to work and his level of injury. (Tr. 336).

With respect to the route sales position, Mr. Stewart classified it as a medium-duty job as defined in the Dictionary of Occupational Titles. (Tr. 337). He opined that the full-time industrial sales position would require "traveling for hours." (Tr. 338). He also opined the counter sales manager position was inappropriate because Claimant possessed no prior plumbing experience. Id. Mr. Stewart testified the security officer position may be suitable, if Claimant possesses a high school diploma and the job position so requires. Id. He also stated the security officer position may require him to remain on his feet constantly. Id. Mr. Stewart did not think Claimant possessed enough intelligence or achievement level to perform commission sales jobs. (Tr. 339). Finally, he opined Claimant would earn less than the wages indicated in the labor market surveys. (Tr. 340).

On cross-examination, Mr. Stewart agreed that from 1994 through the present, there was a general availability of sedentary and light-duty jobs in the southern Mississippi area. (Tr. 341-342). He believed Claimant would not be able to perform door-to-door sales, commission sales or "meeting the public in general," despite his previous experience interfacing with the public while working as a service representative for Employer. (Tr. 342-343).

Mr. Stewart testified he has not actively sought employment opportunities for Claimant, nor has he offered his expertise in developing Claimant's social skills. (Tr. 348). He identified the following unskilled light-duty positions which he believed Claimant to be capable of performing: fuel booth cashier; gate guard; parking lot cashier; security guard; and convenience store cashier. (Tr. 348-349; CX-18, p. 7). He stated that those jobs were available in the Gulfport area, but did not know if such jobs were available in the Wiggins area. (Tr. 349).

He has not contacted any potential employer listed in the August 4, 1999 survey. Id. Mr. Stewart further stated that he was not disputing that Mr. Hegwood concluded all positions identified fell within Claimant's restrictions, but felt that additional information, such as the physical demands, was needed to determine if such a position was suitable alternative employment. (Tr. 350). He explained that some jobs require high school diplomas in order to be considered for work. (Tr. 353). Mr. Stewart is not aware that Claimant has been turned down for any position because he could not prove he had a GED. (Tr. 354). Mr. Stewart stated that he was relying on Claimant's testing results and his hearing testimony as the primary basis for his opinion. (Tr. 355). He did not utilize the Woodcock Johnson Achievement test results in forming his opinion. (Tr. 356).

On re-direct examination, Mr. Stewart testified if Claimant cut his hair, obtained a new set of clothes and "cleaned up a little bit," he would be taken more seriously by potential employers. (Tr. 357). However, he felt the jobs identified were not within Claimant's capacity. Id. Mr. Stewart testified that based on Dr. Danielson's restrictions, Claimant was capable of light-duty work. (Tr. 360).

Contentions of the Parties

Claimant argues the record evidence establishes that he has met the Section 20(a) presumption because he suffered an injury at the C6-7 level while in the course of his employment with Employer on November 2, 1993. Additionally, it is contended that his disability due to herniation at the C4-5 and C5-6 levels was the natural progression of the November 2, 1993 injury and thus, his entire resulting condition is compensable. He also argues that his late-manifesting lumbar injury is related to the November 2, 1993 accident. Claimant further alleges that Employer has failed to establish suitable alternative employment and he is thus entitled to permanent total disability benefits.

Employer/Carrier, on the other hand, argue Claimant has failed to prove that he suffered a work-related injury. Alternately, Employer/Carrier contend that if Claimant was found to have sustained a work-related injury, the only resultant injury was an aggravation of a pre-existing degenerative condition at the C6-7 level. Alternately, Employer/Carrier asserts that if all injuries are found to be work-related, Employer/Carrier should be limited to presumably compensatory and medical liability for the C6-7 condition only in light of the fact that Claimant did not seek medical treatment for the additional conditions for three years. Additionally, it is urged that Claimant can return to light or sedentary labor and that suitable alternative employment was established. Finally, Employer/Carrier contend that should Claimant recover disability compensation benefits, credit to Employer and reimbursement to Employer's long-term disability carrier should be given to avoid a substantial double recovery by Claimant.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced,

violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, the administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

In the present matter, I found Claimant's testimony generally lacked factual uniformity, selectively recalled and not entirely persuasive. Although Claimant provided many contradictory statements and his hearing testimony differed at times from his earlier deposition testimony, I find that he provided sufficient testimony with respect to the causation of his cervical and back conditions. Furthermore, I find that notwithstanding the internal inconsistencies of his testimony, the medical evidence of record buttresses the fact that Claimant did indeed suffer from a pain or harm, as explicated more thoroughly hereinbelow. From an objective standpoint, the harm or pain continued to provide symptoms for which he was treated by various physicians over a period of years.

In brief, Employer attempts to discredit Claimant by scrutinizing the record for instances of his inconsistent testimony. The following are some examples of Claimant's inconsistent testimony which Employer points out in its brief and my reasons for finding such inconsistencies persuasive in establishing Claimant's incredulity.

Employer contends Claimant's testimony is unreliable for two reasons: (1) Claimant's "proof" of a work-related accident and

explanation of why he did not report a work-related injury to Employer or his physicians both contradict each other and "make no sense," and (2) Claimant's testimony is inconsistent with testimony from other witnesses. See Employer's Post-Trial Memorandum, pp. 12, 16.

Employer claims that Claimant did not report a work-related injury because he thought he had bursitis. It is argued that the "bursitis defense" has changed "dramatically through the course of this claim" and that Claimant has contradicted himself by first alleging that after returning from offshore he was told by Dr. Firestone, Mr. Douglas and/or Ms. Dauterive that he had bursitis but yet inconsistently reporting that as he was coming off the rig, he diagnosed himself with bursitis. Throughout his testimony, Claimant attributed the diagnosis of bursitis to various witnesses, each of whom denied telling Claimant that he had bursitis. For example, Mr. Douglas credibly testified that he did not tell Claimant he had bursitis, nor has he ever known Claimant to have such a condition. (CX-24, pp. 26-27). Moreover, Ms. Dauterive denied suggesting to Claimant that he suffered from bursitis. (EX-17, p. 9). Finally, Dr. Firestone never diagnosed Claimant with bursitis. (EX-3). It should be noted that each of the aforementioned witnesses have nothing to gain from the litigation of this matter. Thus, I find the testimony of Mr. Douglas, Ms. Dauterive and Dr. Firestone extremely credible and persuasive. On the other hand, Claimant, who continually changed his testimony regarding the suggestion of bursitis by various persons, has a personal interest in the outcome of this matter and thus, I find his testimony has been seriously flawed by his failure to accurately report his condition.

Nevertheless, whether Mr. Douglas, Ms. Dauterive and/or Dr. Firestone believed or concluded that Claimant suffered from bursitis does not convince me that Claimant did not suffer from a work-related injury. To the contrary, the medical evidence of record supports a finding of harm to his body, as he was treated for two separate cervical conditions and a lumbar condition over a period of time. Thus, I conclude that this particular example of Claimant's inconsistent testimony, although calling into question his credibility, does not necessarily diminish the fact of his bodily harm and injury.

Employer also attempts to undermine Claimant's credibility by pointing out that Claimant allegedly told his roommate, Mr. Douglas, that he injured himself offshore. Employer contends that "if it is true as of the morning of November 4, Claimant recognized he had a work-related injury, why didn't he report it as such thereafter?" The testimonial evidence of Mr. Sikes, Ms. Dauterive

and the medical physicians support Employer's contention that Claimant failed to report his injury as work-related. As noted hereinabove, Claimant's testimony has been seriously called into question due to his failure to accurately report his injury to Employer and other witnesses. In so doing, I find Claimant unpersuasive and accord little probative weight to his testimony. However, although the representation of his non-work-related condition to everyone except Mr. Douglas was inconsistent with his true work-related condition, this does not alter the fact that Claimant suffered bodily harm and injury, which is substantially buttressed by the medical evidence of record.

Moreover, Employer relies on various inconsistencies between Claimant's testimony and other witnesses. Claimant testified that Ms. Dauterive told him he could not file a worker's compensation claim because 14 days had already passed since the alleged work accident. However, Ms. Dauterive denied so informing Claimant or any other employee. I credit Ms. Dauterive's testimony as more believable. Merely because Ms. Dauterive did or did not tell Claimant that he could not file a worker's compensation claim 14 days after the accident does not abrogate the fact of Claimant's harm or injury.

Additionally, Claimant claimed he told Dr. Cannella his shoulder injury was work-related, but that Dr. Cannella told him the claim would not be treated as a work-related claim. Dr. Cannella denied such statements. I credit Dr. Cannella whose medical records support his denial. In fact, Dr. Cannella, who I found to be well-reasoned and persuasive in his testimony, claimed that he had "very accurate" records of his patients. I find that this purported inconsistency, even if true, does not contradict the fact that Claimant sustained a work-related injury. He clearly did not report the injury as work-related.

Finally, Employer points out other inconsistencies which are listed in Employer's Post-Trial Memorandum, pp. 18-21, which I find unpersuasive in establishing that Claimant's harm or pain was not genuine, nor work-related.

Wherefore, I find and conclude that notwithstanding the internal inconsistencies and contradictory evidence, Claimant's cervical and lumbar conditions are substantially buttressed by the medical evidence of record, as explicated below. In light of the foregoing, I will analyze whether Claimant established a prima facie claim for compensation for two separate cervical injuries and a back injury and the applicability of the Section 20(a) presumption.

B. Compensable Injury

According to the Act, an injury is defined as an "accidental injury or death arising out of and in the course of employment[.]" 33 U.S.C. § 902(2). A presumption that an injury arose out of the course of employment arises once a claimant establishes a prima facie claim for compensation. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). In order to establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that he sustained physical harm or pain and that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1982).

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982).

1. Cervical Injury at C6-7 Level

a. Physical Harm or Pain

In the present matter, Claimant testified he began experiencing shoulder pain after working aboard a rig on or around November 2, 1993. (Tr. 78). The medical evidence of record further establishes that Claimant related such shoulder pain to Dr. Firestone, who treated him first. (EX-3, p. 1). Additionally, Claimant reported to Dr. Partrige severe right shoulder and arm pain on November 10, 1993. (CX-23, pp. 5-6). Claimant treated with Dr. Cannella, who also found a ruptured disc at the C6-7 level as well as nerve root compression. (CX-21, p. 8). A cervical diskectomy was performed on December 3, 1993. (CX-21, p. 11). Claimant was last treated for his C6-7 level condition on April 11, 1994, at which time Dr. Cannella released Claimant to return to work with physical restrictions. (CX-21, p. 15).

Based on the foregoing, I find that Claimant's testimony and the sound medical evidence of record clearly establish that Claimant suffered a harm or pain to his cervical region at the C6-7 level and has therefore demonstrated the first element of establishing a prima facie claim for a compensable injury under

Section 20(a).

b. Accident or Conditions at Workplace

In addition to meeting the first element of a prima facie claim, as discussed hereinabove, the claimant must also show that an accident at work or conditions in his workplace could have caused the harm. Kier, 16 BRBS at 129.

In the present matter, the evidence of record establishes Claimant was employed as a service technician whose duties included overseeing the installation of wellhead equipment. (EX-14, p. 10). Claimant testified that on or around November 1, 1993, he was assigned to unplug wells on a Chevron production platform. (Tr. 67-68). He claimed the plugging tool, which weighed about 400 pounds, would have to be moved from well to well manually since the crane (which would have moved the tool) was inoperable. (Tr. 71-76). Claimant further testified that after moving the plugging tool from well to well, he began to experience a burning sensation in his shoulder area. (Tr. 78).

Notwithstanding Claimant's internal testimonial inconsistencies, I find that Claimant was generally credible in establishing that the conditions at his workplace **could have caused** his injury. The fact that he had to **manually** move a 400 pound tool undoubtedly created working conditions in the workplace which could potentially cause injury to an employee.

Thus, in light of the foregoing, I find that the preponderance of the evidence shows that conditions at Claimant's workplace existed which could have caused his cervical harm or pain at the C6-7 level. Accordingly, Claimant has met the second requirement for establishing a prima facie claim for a compensable injury and is entitled to the Section 20(a) presumption.

c. Employer's Rebuttal Evidence

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial and countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical

probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminals, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with **specific and comprehensive medical evidence** proving the absence of, or severing the connection between, the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990).

In the present matter, I find Employer has not presented any substantial and countervailing medical evidence that Claimant's cervical injuries were not caused by his employment with Employer as a service technician. The medical evidence of record establishes that Claimant complained of shoulder and neck pain, which was treated by Drs. Firestone, Campbell, Kyle, Partrige and Cannella. In fact, Dr. Cannella performed a cervical diskectomy with a fusion in an effort to alleviate Claimant's cervical pain. (CX-21, p. 11; attached exhibit B, pp. 7-12). Furthermore, no physician has ever opined that Claimant's cervical injuries did not result from his employment which would thus directly rebut causation. Rather, Dr. Cannella, who treated Claimant's cervical condition for about six months, opined his injuries were due to degeneration since Claimant did not relate a specific incident to the onset of his pain.[10] However, Dr. Cannella admitted that if Claimant was injured on the job in the manner alleged, the accident "could be a precipitating cause for a degenerative disc to become symptomatic." (CX-21, pp. 33-34). Additionally, he stated if Claimant had related to him that his pain began after a specific incident, he would have considered the ruptured disc the result of that incident. (CX-21, p. 40). Claimant was eventually released on April 11, 1994 to return to work with certain physical restrictions.

In light of the foregoing and given the liberal construction of the Act, I find that Employer has failed to show under Greenwich Collieries substantial and countervailing evidence that Claimant's cervical injuries at the C6-7 level were not caused by his employment. Accordingly, I find and conclude Claimant has established a prima facie claim that he suffered a work-related injury to the C6-7 level under the Act sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Cervical Injury at C4-5 and C5-6 Levels

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[10] Dr. Cannella explained that the lack of trauma which allegedly triggered Claimant's herniation "was not an unusual circumstance at all" and stated that the pain could have originated "for no specific reason." (CX-21, pp. 7-8).

a. Physical Harm or Pain

Approximately three years after being released by Dr. Cannella, Claimant re-sought medical treatment for additional cervical problems at the C4-5 and C5-6 levels. (CX-22, p. 15). These cervical problems were treated by Dr. Danielson who found central disc protrusion, stenosis and a herniated disc with cord compression. (CX-22, p. 14; CX-2, p. 12). On April 3, 1998, Claimant underwent surgery at the C4-5 and C5-6 levels. (CX-22, pp. 17-20). Dr. Danielson opined that Claimant's C4-5 and C5-6 level problems were most likely due to an anulus tear which was further aggravated by an injury or accumulated injuries affecting his degenerative condition. (CX-22, pp. 79-80).

It should also be noted that while Claimant was treating with Dr. Cannella in 1993 and 1994, Dr. Cannella noted a mild bulging disc at the C5-6 level of no clinical significance, which at that time did not warrant surgery. (CX-21, p. 8; attached exhibit B, p. 4). In his deposition, Dr. Cannella explained that Claimant's complaints of pain were consistent with the degenerative process. (CX-21, p. 26). He also admitted that upon review of Dr. Danielson's medical notes, Claimant's condition (referring to the C4-5 and C5-6 level problems) may possibly be a consequence of the fusion combining with Claimant's degenerative condition. (CX-21, p. 36).

More importantly, neither Dr. Cannella nor Dr. Danielson ever attributed the C4-5 and C5-6 level problems to the November 2, 1993 work accident. Additionally, neither physician opined that Claimant's latent condition was itself caused by the work accident, nor that it had combined with or contributed to a pre-existing impairment or underlying condition, thus constituting an aggravation or "reinjury." See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

Additionally, Claimant testified he continued to experience pain in his neck and shoulder during the interim period he was not seeking medical treatment. (Tr. 107-109). Having found Claimant's testimony unpersuasive and highly contradictory, I accord no probative weight to his testimony regarding his continuing pain. The fact that Claimant did not seek medical treatment for more than three years, although he was allegedly continuing to experience pain, belies the severity on existence of pain and does little to convince me that the C4-5 and C5-6 level injuries were work-related.

Based on the foregoing, I find Drs. Cannella and Danielson's medical opinions to be well-reasoned and persuasive in establishing

that Claimant suffered harm or pain to his cervical region at the C4-5 and C5-6 levels. However, in view of a three year period from the alleged causative accident to medical treatment, and because neither physician has attributed the C4-5 and C5-6 level harm or pain to the work accident of November 2, 1993, except by speculation, I find that Claimant has not established that the latent cervical injuries are work-related. Thus, he has failed to establish a prima facie claim for compensation. Wherefore, Claimant is not entitled to the Section 20(a) presumption that the additional and latent cervical injuries arose out of and in the course of his employment with Employer.

3. Back Injury

a. Physical Harm or Pain

Claimant also alleges that he suffered a back injury as a result of the November 2, 1993 work accident. As noted hereinabove in the medical evidence, Claimant failed to report a back injury until April 17, 1997, almost three and one-half years after the November 2, 1993 work accident occurred. The latent appearance of this alleged condition makes it highly unbelievable that it was related to the November 2, 1993 work accident. Moreover, my conclusion that the back condition was not causally related to the November 2, 1993 work accident is buttressed by the sound medical reports of Drs. Firestone, Partrige and Cannella, who did not record any back complaints. When Claimant ceased treating with Dr. Cannella in March 1994, he did not seek **any** medical treatment, for cervical problems, back problems or otherwise, until April 17, 1997, at which time, he presented to Dr. Danielson with complaints of minor back pain, which were not even recorded in his notations. (CX-22, p. 14).

Moreover, during the time Dr. Danielson treated Claimant, he opined that Claimant's lumbar problems were **not** due to the November 1993 accident, but rather, "to some tear in the anulus that he developed from lifting or torquing some way." (CX-22, p. 83). Additionally, Dr. Danielson stated that he would not relate the lower back pain to the 1993 accident due to the length of time which passed before the condition manifested itself. (CX-22, pp. 84-85). I find Dr. Danielson's medical opinion to be well-reasoned and persuasive in light of his qualifications and given the fact that he has treated and evaluated Claimant for more than two years. It should also be noted that no other physician disputes Dr. Danielson's medical opinion regarding Claimant's back condition being unrelated to the November 1993 work accident.

Finally, Claimant testified that his back problems did not

manifest until four years after the work accident. (Tr. 220).

In light of the foregoing, I find Claimant has not established that he suffered a harm or pain to his back as a result of the November 2, 1993 work accident. Consequently, I conclude that Claimant has failed to establish a prima facie claim for compensation and is therefore not entitled to the Section 20(a) presumption that his alleged back injury arose out of and in the course of his employment with Employer.

C. Nature and Extent of Disability

Having found that Claimant's back injury is not a compensable injury and that Claimant suffers from a compensable cervical injury, the burden of proving the nature and extent of his disability, as it relates to his cervical condition, rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

1. Cervical Injury at C6-7 Level

The parties stipulated that Claimant reached maximum medical improvement with respect to the cervical condition at the C6-7 level on April 11, 1994. Dr. Cannella's records and opinions support the stipulation and therefore, I find that Claimant reached maximum medical improvement on April 11, 1994 with respect to the C6-7 level injury.

Accordingly, I find that Claimant was temporarily and totally disabled from November 2, 1993, the date of injury, until April 11, 1994, the date he reached maximum medical improvement with respect to the C6-7 level injury. Thus, Claimant is entitled to temporary total disability compensation benefits from November 2, 1993 through April 11, 1994 based on his average weekly wage of $751.89.

It should be noted that Dr. Cannella opined Claimant could not return to his former employment as a service technician, but could return to certain work within physical restrictions. (CX-21, p. 16). Thus, because Claimant was restricted from returning to his former work, he has established a case of total disability. Consequently, when Claimant reached maximum medical improvement, his condition became permanent and total and he is entitled to permanent total disability compensation benefits from April 12, 1994 through August 4, 1999, the date suitable alternative employment was established, as discussed hereinbelow.

2. Cervical Injury at C4-5 and C5-6 Levels

The parties stipulated that Claimant reached maximum medical improvement with respect to the cervical condition at the C4-5 and C5-6 levels on September 23, 1998. However, because I found the C4-5 and C5-6 level injuries were unrelated to Claimant's employment and the work accident of November 2, 1993, the issue of nature and extent of disability is moot and need not be addressed in this Decision.

3. Back Injury

Because I found the back injury to be unrelated to Claimant's employment with Employer, the issues of nature and extent of disability and maximum medical improvement therefrom are moot and need not be addressed in this Decision.

E. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of

performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F. 2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F. 2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F. 2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to

the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that "...It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In the present matter, Employer relies upon the two labor market surveys dated May 3, 1999 and August 4, 1999 and the testimony of Mr. Hegwood and Ms. Palmer as supportive of the existence and establishment of suitable alternative employment.

The first labor market survey was performed on May 3, 1999 to assess the retroactive availability of employment for Claimant in the Gulfport, Mississippi area from 1994 through 1998. Although he located nine (9) positions in 1994, 12 positions in 1995, 12 positions in 1996, 13 positions in 1997 and 6 positions 1998, Mr. Hegwood failed to determine whether each potential employer would have considered Claimant, in particular, for employment, and failed to address the physical and functional demands of each job vis-a-vis Claimant's restrictions. In fact, Mr. Hegwood noted that the "general job openings" were derived from advertisements in The Sun Herald, a Gulf Coast newspaper. He claimed that these job openings were consistent with Claimant's physical limitations as assigned by Dr. Cannella without any further explication. (EX-13, pp. 12-18).

I find that these general job openings fail to document the physical and functional requirements and demands of the work to be performed. As noted hereinabove, the precise nature and details of job opportunities must be established to allow a rational determination of its suitability and realistic availability. These general positions fail to denote **any** requirement whatsoever. Additionally, Mr. Hegwood does not even specify the name of each potential employer and fails to denote with specificity the actual duties to be performed, although he claimed that each position fell within Claimant's physical capabilities. Accordingly, I reject each of the general positions identified in the May 3, 1999 retroactive labor market survey as suitable alternative employment because of a lack of specificity upon which a rational decision can be made.

Mr. Hegwood conducted a second labor market survey on August 4, 1999, in which he identified the following specific employment opportunities for Claimant: Superior Lamp & Supply industrial sales position; Blue Ribbon manager trainee; Schwan's Ice Cream route sales position; Bert Allen Pontiac/GMC sales position; Ferguson Enterprises counter sales manager; Imperial Palace security guard and Motel 6 night manager. (EX-13, pp. 24-26). Each position was described in detail, including the salary to be earned, whether

training was involved, whether the position was full-time and the physical and functional demands of the job to be performed. Id.

It should be noted that Dr. Cannella's work restrictions with respect to Claimant's cervical condition included no heavy lifting greater than 15 pounds for approximately one-third of an eight hour work day and limited sitting, standing, stooping, bending, pushing and pulling. (CX-21, pp. 16, 28). Additionally, Dr. Danielson restricted Claimant from rapid head and neck movements, prolonged extension of the neck and stacking objects overhead. (CX-22, pp. 34-35).

The industrial sales position at Superior Lamp & Supply[11] is a full-time position which involves alternate sitting, standing and walking. (EX-13, p. 24). This position's salary was reported to begin between $38,000 and $45,000. Id. Claimant would be required to lift no more than 15 pounds. Id. Finally, no previous experience is required, as Claimant would be trained for this position. I find that this job position meets Claimant's physical and functional requirements, as set forth by Drs. Cannella and Danielson. Accordingly, I find this position to be suitable alternative employment.

The manager trainee position at Blue Ribbon involves alternate sitting, standing and walking. Id. The maximum lifting requirement is 25 pounds or less, but assistance with lifting is offered. Id. Again, no previous experience is necessary, as Claimant would be trained for the position. Id. The manager trainee earns $150.00 per day plus commission. Id. I find that the physical duties of this position with assistance in lifting also meets Claimant's physical and functional limitations and therefore this job constitutes suitable alternative employment.

The route sales position with Schwan's Ice Cream involves home delivery of frozen food items and requires a chauffeur's license. Physical duties include alternate sitting, standing, walking and occasional stooping. Id. The maximum lifting requirement is 10 pounds or less. Id. Finally, potential earning ability is $40,000 per year. Id. I find that this position does not constitute suitable alternative employment for two reasons. First, Claimant has testified that he cannot drive in a automobile for more than one hour without stopping to stretch. Since Mr. Hegwood failed to establish the length of time Claimant would be driving during the sales route, I conclude this duty does not fall within Claimant's

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[11] Mr. Hegwood testified Superior Lamp & Supply's headquarters office is in New Jersey, but the company has a store in Gulfport, Mississippi.

capability. Second, Claimant does not possess a chauffeur's license. In light of the foregoing, I find the route sales position is not suitable for Claimant.

The auto sales position at Bert Allen Pontiac/GMC required no previous sales experience. (EX-13, p. 25). The physical duties involved alternate sitting, standing and walking and the maximum lifting requirement was limited to paperwork only. Id. The hourly wage rate for this position is $12.42. Id. I find that the duties of this position fall within Claimant's physical and functional capabilities and therefore this position constitutes suitable alternative employment.

The counter sales position at Ferguson Enterprises involves filling orders and supervising others at a plumbing and industrial supply wholesale distribution company. Id. The physical duties involved include alternate sitting, standing and walking. Id. Lifting is limited to 20 pounds or less. Id. The hourly wage rate for this position is $18.27. Id. Since the lifting requirements of this position exceed Dr. Cannella's restrictions and no evidence is presented that lifting assistance is offered, like the Blue Ribbon manager trainee position, I find the counter sales manager position does not constitute suitable alternative employment.

The security officer position at the Imperial Palace involves alternate sitting, standing and walking. Id. Lifting is limited to 15 pounds or less. Id. Additionally, it is noted that this position does not require the apprehension of offenders, but rather, is designed to alert the proper individuals in charge. Id. The starting salary is listed at $8.50 per hour. Id. Since this position meets Claimant's physical and functional limitations, I find the security officer position constitutes suitable alternative employment.

Finally, the night manager position at Motel 6 involves alternate sitting, standing and walking. (EX-13, p. 26). Lifting requirements do not exceed 10 pounds. Id. Claimant would be required to check in and check out motel guests and respond to guest requests. Id. Finally, handling credit card charges and cash transactions would be required. Id. The hourly wage rate for this position is $8.80. Id. I find that these duties fall with Claimant's physical and functional capabilities and therefore the night manager position constitutes suitable alternative employment.

It should be noted that each of the positions identified in the August 4, 1999 labor market survey established the availability of positions in the Gulfport and Biloxi, Mississippi area. In light of the fact that Gulfport and Biloxi are approximately 35

miles and 45 miles, respectively, from Wiggins, Mississippi, Claimant's home town, and Claimant testified that he can drive for approximately one hour before stopping to stretch, I find that Claimant is fully capable of driving to each job, except the route sales and counter sales positions, and performing the duties, as explicated hereinabove. Therefore, I find that each of the positions, except as noted hereinabove, constitute suitable alternative employment.

Finally, I find Mr. Stewart's opinion unpersuasive in rebutting Mr. Hegwood and Ms. Palmer's testimony and vocational efforts. Mr. Stewart zealously pointed out that Claimant would not be seriously considered for the positions due to his below-average I.Q. and opined that Claimant does not have any transferable skills, especially in regards to the sales and management positions identified. However, Mr. Hegwood noted that the industrial sales position would offer training, while the other positions, such as manager trainee, auto sales representative, security officer and night manager required no previous experience. (EX-13, pp. 24-26).

Mr. Stewart also maintained that the labor market survey was not realistic because the same job title with different employers could involve considerably different physical demands. He further opined that since Mr. Hegwood and Ms. Palmer failed to interview each employer to ascertain specific physical demands and requirements, none of the positions constitute suitable alternative employment. However, I find Mr. Stewart's opinions unpersuasive as Mr. Hegwood credibly testified that he spoke with each potential employer to specifically discuss whether the job duties fell within Claimant's capabilities. (Tr. 261). Additionally, he asked each employer whether Claimant would be considered for a job position. (Tr. 262). In light of the foregoing, I do not discount the August 4, 1999 labor market survey. Wherefore, I find Mr. Hegwood and Ms. Palmer established suitable alternative employment, as explicated hereinabove, effective August 4, 1999.

F. Average Weekly Wage

After the hearing, the parties stipulated that Claimant's average weekly wage at the time of injury was $751.89. (EX-19). Thus, I find Claimant's average weekly wage to be $751.89, which will be applied to his disability compensation benefits, as described hereinbelow.

November 2, 1993 - April 11, 1994

As noted hereinabove, Claimant was temporarily and totally disabled from November 2, 1993, the date of injury, through April

11, 1994, the date he reached maximum medical improvement with respect to his C6-7 condition. Thus, he is entitled to the corresponding compensation rate of $501.29, based on his average weekly wage of $751.89 ($751.89 x 66⅔% = $501.29).

April 12, 1994 - August 4, 1999

Thereafter, Claimant's disability status became permanent and total, as he was unable to return to work and suitable alternative employment had not yet been established. Thus, he is entitled to the corresponding compensation rate of $501.29 per week, based on his average weekly wage of $751.89 ($751.89 x 66⅔% = $501.29) from April 12, 1994 through August 4, 1999, the date suitable alternative employment was established.

August 5, 1999 - present

Thereafter, suitable alternative employment having been established causes Claimant's disability status to become permanent partial and entitles him to compensation benefits based on the difference between his average weekly wage and his post-injury wage earning capacity.

Having found that the industrial sales position (paying $38,000 to $45,000 per year), manager trainee position ($150.00 per day plus commission), auto sales position ($12.42 per hour), the security guard position ($8.50 per hour) and the night manager position ($8.80 per hour) constituted suitable alternative employment, I find that Claimant's post-injury wage earning capacity is $13.35 per hour[12] or $534.00 per week.

Therefore, beginning August 5, 1999 and continuing through

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[12] This figure is derived by averaging the hourly wages of the suitable alternative positions. The industrial sales position listed a starting salary of $38,000 to $45,000. Given the fact that Claimant has no previous sales experience, I used the starting salary of $38,000 to determine an hourly wage ($38,000 ÷ 52 weeks = $730.77 per week ÷ 40 hours per week = $18.27 per hour). Furthermore, the manager trainee position listed the wages at $150.00 per day plus commission. Because the amount of commission earned per day is not noted, I used $150.00 to determine an hourly wage ($150.00 ÷ 40 hours per week = $18.75). Thus, by averaging each hourly wage, I determined that Claimant's average hourly wage earning capacity is $13.35 ($18.27 + $18.75 + $12.42 + $8.50 + $8.80 = $66.74 ÷ 5 = $13.35 per hour x 40 hours per week = $534.00 per week).

present, Claimant is entitled to the corresponding compensation rate of $145.27 per week, based on the difference between his average weekly wage of $751.89 and his post-injury wage earning capacity of $534.00 per week ($751.89 - $534.00 = $217.89 x 66⅔% = $145.27).

G. Credit to Employer/Reimbursement to Metropolitan Life

Claimant was paid $22,018.80 in short-term disability benefits by Employer from November 4, 1993 through May 3, 1994. See Employer's Post-Hearing Memorandum, p. 32. Employer contends that if it is found responsible for Claimant's conditions and any payments are ordered, credits to Employer for payment of short-term disability benefits and medical benefits and reimbursement to its long-term disability carrier, Met Life, are due in order to avoid double recovery to Claimant.

Section 14(j) of the Act allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. Balzer v. General Dynamics Corp., 22 BRBS 447 (1989); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941 (5th Cir. 1991). If an employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). Mijangos, supra; see also Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312 (5th Cir. 1997). The employer, however, is not entitled to a credit when it continues the employee's salary under a formal salary continuance plan unless it shows that these payments were intended to be advance payments of compensation. Shell Offshore, supra (citing Fleetwood v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 282 (1984), aff'd 776 F.2d 1225 (4th Cir. 1985).

Additionally, payments made to an employee under a non-occupational health insurance plan are not compensation for purposes of credit. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130, 1137 (1981). Because medical expenses are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. Aurelio v. Louisiana Stevedores, 22 BRBS 418 (1989). Moreover, the employer is not entitled to a credit for payment made by a non-occupational sickness and accident carrier because the employer is not entitled to receive credit for money it never paid. Mijangos, supra; Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473 (1978). Neither are veterans' disability benefits subject to the credit doctrine to offset an employer's liability because such benefits are not paid pursuant to a state workers' compensation law or the Jones Act. Todd Shipyards Corp. v. Director, OWCP, 848 F.2d 125

(9th Cir. 1988). Finally, medical benefits are not considered to be compensation. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988).

In light of the foregoing jurisprudence, I find Employer is not entitled to a credit for the amount of medical benefits paid on behalf of Claimant. With respect to the short-term disability benefits, there is no record evidence that such payments were intended to be advance payments of compensation and thus were not paid pursuant to the Act and therefore cannot be considered compensation for purposes of receiving a credit. Since the record does not support otherwise, I find and conclude the short-term disability benefits received by Claimant and voluntarily paid by Employer, are not advance compensation payments for which Employer is entitled to a credit.

Employer's reliance on the jurisprudence cited in its brief does little to persuade the undersigned that it is entitled to a credit. The jurisprudence discussed hereinabove is clear in establishing under what auspices Employer is entitled to a credit. In the present case, Employer does not meet those essential requirements in order to be entitled to a credit.

Finally, with respect to Employer's request that Met Life, Employer's long-term disability carrier, be reimbursed, this issue is not properly before this court, as Met Life has not intervened. Employer has not shown any authority to act on Met Life's behalf. Thus, this issue need not be addressed in this Decision. However, assuming arguendo that Met Life has a meritorious claim for reimbursement of monies paid to Claimant, reimbursement arguably may be sought from compensation due Claimant from Employer's Longshore liability Carrier, who is responsible for paying disability compensation benefits under the Act. See e.g. Januszieiwicz v. Sun Shipbuilding & Dry Dock, 677 F.2d 286 (3d Cir. 1982); Aetna Life Insurance v. Harris, 578 F.2d 52 (3d Cir. 1978).

H. Authorization to treat with Dr. Danielson

Under Section 7(b) and (c) of the Act, the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. Roger's Terminal & Shipping Co. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). Additionally, the employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C.

Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change of physician can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, supra.

Moreover, under Section 7(d)(2), an employer is not liable for medical expenses unless, within ten (10) days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. 33 U.S.C. § 907(d)(2); Krohn v. Ingalls Shipbuilding, Inc., 29 BRBS 72 (1994). Further, in the interest of justice, the Secretary may excuse the failure to comply with the provisions of this section. 33 U.S.C. § 907(d)(2); see generally Roger's Terminal, supra; Force v. Kaiser Aluminum & Chemical Corp., 23 BRBS 1 (1989), aff'd in pertinent part, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991).

In the present matter, Claimant was released from medical treatment by Dr. Cannella on April 11, 1994. At that time, Claimant was not referred to any other physician. Thereafter, he did not seek any medical treatment until three years later, at which time, he attributed his latent condition to his employment and the November 2, 1993 work accident. Claimant testified that he failed to inform Employer about Dr. Cannella's release in 1994 and that he resumed medical treatment in 1997 with Dr. Danielson for alleged work-related injuries without seeking authorization from Employer/Carrier. (Tr. 194-195).

Current jurisprudence does not demonstrate that retroactive authorization for medical treatment can occur, but rather requires authorization to occur **before** visiting a physician, except in cases of emergency or neglect/refusal. The facts presented in this matter do not indicate that Claimant needed to be examined by Dr. Danielson on an emergency basis, or that Claimant was being neglected or being refused medical treatment. In fact, Claimant failed to seek treatment on his own accord for approximately three years despite his testimony that he continued to suffer from pain.

Additionally, the record is devoid of any evidence that Dr. Danielson filed a medical report with Employer within ten (10) days of his first treatment of Claimant.

Based on the foregoing, I find that Employer/Carrier are not liable for medical treatment of Claimant by Dr. Danielson because Claimant failed to obtain proper authorization for such treatment from Employer/Carrier or the Department of Labor before being treated by Dr. Danielson. Furthermore, in light of the fact that Dr. Danielson failed to provide a timely report, Employer is not liable for such medical expenses.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer has not paid Claimant any disability compensation under the Act. Rather, Claimant was paid long-term disability benefits by Met Life and short-term disability and medical benefits by Employer. As noted hereinabove, non-occupational health benefits and medical benefits are not considered compensation under the Act. Pardee, supra; Caudill, supra. Thus, Claimant has not received **any** compensation pursuant to the Act.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[13] Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981).

It should be noted that the employer's knowledge of a claimant's injury triggers a duty to pay or controvert. Benn v. Ingalls Shipbuilding, 25 BRBS 37, 39 (1991), aff'd sub nom, Ingalls Shipbuilding v. Director, OWCP, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992). Under current interpretation of Section 12(d)(1), the employer must know of the injury **and** that it is work-related. Spear v. General Dynamics Corp., 25 BRBS 132 (1991).

In the present matter, Employer was aware that Claimant suffered an injury, but since Claimant did not report that it was work-related until May 9, 1994, the date on which he filed the LS-203, I find that Employer was not aware of the work-relatedness of the injury until that date. In so finding, I conclude that Employer/Carrier's notice of controversion was timely because the first notice of controversion was filed on June 3, 1994, which was within the required period of time to file a notice of

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[13] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

controversion after compensation became due. Accordingly, Claimant is not entitled to any penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 2, 1993 through April 11,

1994, based on Claimant's average weekly wage of $751.89, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from April 12, 1994 through August 4, 1999 based on Claimant's average weekly wage of $751.89, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from August 5, 1999 and continuing through present based on the difference between Claimant's average weekly wage of $751.89 and his reduced weekly earning capacity of $534.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 2, 1993 work-related injuries to the C6-7 cervical level, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1994, for the applicable period of permanent total disability.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel

who shall then have twenty (20) days to file any objections thereto.

ORDERED this 1st day of February, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge